In the Supreme Court of the United States

October Term, 1970

No. 957 and No. 6018

UNITED STATES OF AMERICA, ET AL, PETITIONERS

v.

THE PULLMAN COMPANY

EARL A. LOVE, PETITIONER

v.

THE PULLMAN COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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RELEVANT DOCKET ENTRIES

1968	
May 28	Filed Complaint
June 19	Filed Answer
October 3	Appointment of Hugh J. McClearn as counsel
November 4	Filed Amended Complaint
December 3	Filed Motion to Dismiss
1969	
February 28	Order entered granting Motion to Dismiss
March 12	Notice of Appeal
April 24	Motion by EEOC to file brief *Amicus Curiae* and Order granting same
September 22	Original Opinion and Judgment
October 6	Petition for rehearing *en banc*
October 9	Motion for Leave to Intervene by EEOC
November 7	Motion for Leave to Intervene by United States
1970	
January 1	Order granting Motion of EEOC and United States to Intervene and for rehearing
July 30	Opinion on rehearing and Judgment

United States District Court
District of Colorado

Civil Action No. C-899

[Filed Nov. 4, 1968, G. Walter Bowman, Clerk]

EARL A. LOVE *Plaintiff,* vs. THE PULLMAN COMPANY, an Illinois corporation, *Defendant.*	AMENDED COMPLAINT

1. This action is based on the provisions of 42 U.S.C. Sec. 2000 e, et seq., commonly referred to as the 1964 Civil Rights Act. Subject matter jurisdiction is conferred upon this Court by 42 U.S.C. Sec. 2000 e-5(f).

2. Plaintiff is now and for the past forty-two years has been employed by Defendant as a porter. Since about 1951, Plaintiff has been qualified under Defendant's employment classification system to act as a porter in charge. Plaintiff has and continues to act as a porter in charge when called upon to do so by Defendant. Plaintiff is a Negro. Plaintiff is presently assigned to Defendant's Denver Division office. The unlawful employment practices of which he complains are being committed on a continuing basis in the State of Colorado. The employment records relevant to such practices or some of them are maintained and administered in the State of Colorado.

3. Defendant is an Illinois corporation engaged in an industry affecting commerce and during all times material to this action has employed more than 100 employees for each working day in each of twenty or more calendar weeks in each year material to this action.

4. This action is brought on behalf of Plaintiff as well as on behalf of each and all other persons similarly situated who are employed by Defendant and classified as porters in

charge. Such persons number in the thousands and are located in all parts of the United States and, therefore, are so numerous as to make it impracticable to bring them all before the Court. The right which is the subject of this action, is common to all of Defendant's employees who are classified as porters in charge and there are questions of law and fact common to all such persons. The claim of Plaintiff is typical of the claims of all such persons and Plaintiff will fairly and adequately protect the interests of all members of the class.

A. This action is maintainable under Rule 23 (B)(1)(A) because prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the Defendant.

B. This action is maintainable under Rule 23 (B)(2) because Defendant has already refused to act on grounds generally applicable to the class when asked to do so by the Equal Employment Opportunity Commission thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

C. This action is also appropriately brought under Rule 23 (B)(3) because questions of law and fact common to the members of the class predominate over any questions affecting only individual members and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

5. The job classifications of porter and porter in charge used by Defendant within the United States are now and always have been all Negro classifications. The job classification of conductor used by the Defendant within the United States was an all white classification until after the effective date of the 1964 Civil Rights Act and remains substantially such today. Plaintiff and those similarily situated, when acting as porters in charge, perform the same duties and assume the same responsibilities as conductors. Porters in charge must be ready at all times to act as conductors. There is now and always has been a significant pay differential between the pay of a conductor and the pay of a porter in charge.

6. Plaintiff filed a written charge under oath with the Equal Employment Opportunity Commission in which he claimed to be aggrieved by Defendant because he received lower wages as a Negro classified as a porter in charge than a white person classified as a conductor received for performing the same duties and assuming the same responsibilities.

7. The Equal Employment Opportunity Commission advised Plaintiff that it had found reasonable cause existed to believe that he was being discriminated against by the Defendant in violation of the 1964 Civil Rights Act. On May 3, 1968, the Commission notified Plaintiff that it had been unsuccessful in obtaining Defendant's voluntary compliance with the 1964 Civil Rights Act and advised him that he had 30 days within which to institute suit and that he was authorized to request the appointment of an attorney to represent him and to commence suit without the payment of fees, costs or security.

WHEREFORE, Plaintiff demands judgment against Defendant enjoining it from continuing its racially discriminatory job classification system, a money judgment in the amount that Plaintiff and each of the other persons similarly situated would have received had they not been discriminated against because of their race, attorneys' fees, costs and such other relief as the Court believes proper.

PLAINTIFF'S ADDRESS:
1511 East 29th Avenue
Denver, Colorado 80205

HUGH J. McCLEARN
/s/ Hugh J. McClearn
Attorney for Plaintiff
1950 Western Federal Savings Building
Denver, Colorado 80202
Telephone: 222-3737

CONSENT TO FILING OF AMENDED COMPLAINT

Defendant consents to the filing of this Amended Complaint.

NEEF, SWANSON AND MYER
/s/ Edward C. Eppich
Attorneys for Defendant
1908 Tower Building
1700 Broadway
Denver, Colorado 80202
Telephone: 825-6271

United States District Court
District of Colorado

Civil Action No. C-899

[Filed Dec. 3, 1968, G. Walter Bowman, Clerk]

EARL A. LOVE, *Plaintiff,* vs. THE PULLMAN COMPANY, an Illinois corporation, *Defendant.*	MOTION TO DISMISS

COMES Now the defendant, The Pullman Company, by and through its undersigned attorneys of record and moves this court to dismiss the plaintiff's amended complaint with prejudice and enter judgment in favor of the defendant, The Pullman Company, and as grounds for this motion it is shown unto the court:

1. The plaintiff's cause of action is allegedly based on Title VII of the Civil Rights Act of 1964 (42 USCA Section 2000e-5 et seq.), and jurisdiction of this court is allegedly conferred by 42 USCA 2000e-5(f).

2. Plaintiff has not complied with the jurisdictional prerequisite required by 42 USCA, Section 2000e-5(b) and has not exhausted his state administrative remedies as therein set forth.

3. Any charge filed by the plaintiff with the Equal Employment Opportunity Commission was not timely filed in accordance with the provisions of 42 USCA, Section 2000 e-5(d).

4. Plaintiff voluntarily resigned his position with the

defendant, The Pullman Company, on November 17, 1968, and hence this cause of action has become moot.

NEEF, SWANSON AND MYER
/s/ Edward C. Eppich
Attorneys for Defendant
1908 Tower Building
1700 Broadway
Denver, Colorado 80202
Telephone: 825-6271

HUGH J. MCCLEARN, attorney of record for the plaintiff, hereby acknowledges receipt of the defendant's Motion to Allow Late Filing and to Dismiss the plaintiff's amended complaint, and hereby consents to the granting of the Motion to Allow Late Filing.

/s/ Hugh J. McClearn
Attorney for Plaintiff
1950 Western Federal Savings Bldg.
Denver, Colorado 80202
Telephone: 222-3737

ORDER

On motion of the defendant it is hereby ordered that the defendant be granted leave to file the Motion to Dismiss the plaintiff's amended complaint hereto attached.

DATED at Denver, Colorado, this 3rd day of December, 1968.

BY THE COURT:
/s/ Alfred A. Arraj
Judge.

[Entered on the docket Dec. 3, 1968, G. Walter Bowman, Clerk]

State of Colorado
Civil Rights Commission

June 1, 1966

Mr. Lee Williams
Regional Director
Equal Employment Opportunity Commission
Dallas, Texas

Dear Mr. Williams:
It has come to my attention that Mr. Love has filed a complaint against the Pullman Company through your office.

We of this office discussed this problem with Mr. Love and several other Pullman Company employees. It appears that Mr. Love lacks confidence in this Commission. He did not return to file a complaint after discussing the matter with me.

Under the circumstances we could not in good conscience accept the sixty-day deferment period and accordingly waive it. Will you proceed under the provisions of Title VII to give any relief that you can to Mr. Love.

Sincerely,

/s/ James F. Reynolds
James F. Reynolds
Director

JFR:rd

EXHIBIT A

United States District Court
District of Colorado

Civil Action No. C-899

[Filed Jan. 3, 1969, G. Walter Bowman, Clerk]

EARL A. LOVE,

Plaintiff,

vs.

THE PULLMAN COMPANY, an Illinois corporation,

Defendant.

AFFIDAVIT OF EARL A. LOVE

STATE OF COLORADO
CITY AND COUNTY OF DENVER } ss.

EARL A. LOVE, being duly sworn, deposes and states that the Xerox copy of Charge of Discrimination dated July 23, 1966, attached hereto, is an accurate copy of the document which he filled out and submitted to the Equal Employment Opportunity Commission on or about July 23, 1966, and that the letter addressed to him from Tom. E. Robles dated May 3, 1968, is the document he received in the mail shortly after May 3, 1968.

Dated: Denver, Colorado, January 3, 1969.

/s/ Earl A. Love
Earl A. Love

The foregoing Affidavit was acknowledged before me on January 3, 1969, by EARL A. LOVE.

My commission expires June 21, 1970.

Witness my hand and seal.

/s/ Helen Rayce
Notary Public

(The law requires that your charge be made under oath. You may take this paper for notarization to a notary public or other official who is authorized to administer oaths. If this is impractical, send this paper to the Commission without having it notarized. The Commission will arrange to have the oath administered to you.)

I SWEAR OR AFFIRM THAT I HAVE READ THE ABOVE AND THAT IT IS TRUE TO THE BEST OF MY KNOWLEDGE

DATE: *July 23, 1966* *Earl A. Love*
(Sign here)

Subscribed and sworn to before me this *23* day of *July*, 196*6*. *Jos L. Black*, *Field Representative EEOC*
(Name) (Title)

You need not be able to answer the questions below, but if you do know the answers, it will help the Commission to handle your complaint more quickly.

1. Have you filed a complaint about this discrimination with a State or local government agency?
   ☒ Yes ☐ No
   If you checked yes, please give the following information:

   NAME OF AGENCY: *Civil Rights Commission*

   ADDRESS: *306 State Services Building, 1525 Sherman St. Denver, Colorado 80203*

   DATE YOU FILED COMPLAINT: _____

2. If your charge is against a company or a union, does it have more than one hundred (100) employees or members?
   ☒ Yes ☐ No ☐ Do not know

Mail to:

Lee G. Williams, Regional Director
Equal Employment Opportunity Commission
1309 Main St., Dallas, Texas 75202

GSA DC 66-3074

Form approved
Bureau of the Budget
No. 124-R001

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
REGIONAL OFFICE
1309 Main St., Dallas, Texas 75202

CHARGE OF DISCRIMINATION

FILL OUT THIS FORM: (Please print or type)

YOUR NAME: *Mr. Earl A. Love* *673-5695* (telephone number)

ADDRESS: *1511 E. 29th Ave.* (Number and Street)

Denver, (City) *Colorado* (State) *80205* (Zip code)

1. Were you discriminated against in connection with employment because of

   ☒ Race or Color ☐ Religion
   ☐ Sex ☐ National Origin

2. Who discriminated against you? Give the name and address of the employer, labor organization, employment agency, or apprenticeship committee.

   NAME: *Pullman Company*
   ADDRESS: *23rd St. & Fox (West)*
   Denver, Colorado

3. When did this discrimination take place?

1	*Jun*	*46 and continuing*
Day	Month	Year

4. Please tell your story of discrimination. Explain what unfair thing was done to you.

   I have been performing the duties as an "in-charge" porter which has duties and responsibilities of a Pullman Conductor and yet I receive lower wages. I believe that I am being discriminated against because of my race.

(use more sheets if needed)

United States District Court
District of Colorado

Civil Action No. C-899

[Filed Feb. 28, 1969, G. Walter Bowman, Clerk]

EARL A. LOVE,

Plaintiff,

vs.

THE PULLMAN COMPANY, an Illinois corporation,

Defendant.

ORDER

The plaintiff's action is based upon the provisions of 42 USCA, Section 2000-e-5 et seq., commonly referred to as Title VII of the Civil Rights Act of 1964. The plaintiff alleges that he has been employed by the defendant for a number of years as a porter, and for the last several years he has been performing the duties and responsibilities of the porter-in-charge, which are commensurate with the duties and responsibilities of a Pullman conductor, yet he received lower wages due to his race.

The defendant has moved to dismiss the action on the grounds that the court lacks jurisdiction over the subject matter and that the plaintiff's cause of action has become moot. The defendant's motion is supported by the deposition of James Reynolds, Director of the Colorado Civil Rights Commission, together with the exhibits attached thereto. The record also contains facts which have been stipulated to by counsel for the parties. Accordingly, the motion to dismiss filed by the defendant will be treated as a motion for summary judgment.

Before an action may be commenced under Title VII of the Civil Rights Act of 1964, 42 USCA, § 2000-e-5 et seq., there are certain statutory prerequisites which must be met before this court has jurisdiction over the subject matter of this type of action.

It is apparent from 42 USCA, § 2000-e-5(b), that if a state has a statute which prohibits the alleged unlawful

employment practice, that no charge may be filed under the Civil Rights Act of 1964 with the EEOC until after proceedings have been commenced under the state law. The State of Colorado has such a statute (CRS 1963 80-21-1 et seq.) which has been in effect since 1957 and prohibits the type of employment practice alleged by Mr. Love. The Colorado statute (CRS 1963 81-21-7(1)) requires the filing of a written complaint with the Colorado Civil Rights Commission to commence proceedings there. The Colorado statute is recognized by the EEOC as a state law which requires deferral of the EEOC action under 42 USCA, §2000-e-5(b).

The record before the court shows that in 1963 the plaintiff did file a written complaint with the Colorado Civil Rights Commission, but apparently this claim was not resolved, at least to the plaintiff's satisfaction. Thereafter, in the summer of 1965, the plaintiff again went to the Colorado Civil Rights Commission and restated his complaint to the Commission; but no written complaint was filed at that time; however, Mr. Reynolds, the director and head of the Colorado Civil Rights Commission, did contact the defendant who stated they would promote Mr. Love to the position of a conductor, but that he would probably be laid off because of the seniority rules in effect. On July 30, 1965, the Colorado Civil Rights Commission so advised Mr. Love by letter.

It is the court's opinion that since Colorado has a state law prohibiting the discrimination alleged by the plaintiff and providing a remedy for such discrimination, that the language of 42 USCA, § 2000-e-5(b) requires that an aggrieved person exhaust his remedies through the state machinery before the EEOC and this court are conferred with jurisdiction over the subject matter. Although the plaintiff did not file a written complaint in 1965 with the Colorado Commission, he did file such a complaint in 1963. It is the court's opinion that the Colorado Civil Rights Commission treated the oral complaint in 1965 as a reopening of the 1963 matter, and that although there wasn't literal compliance with the wording of the statute there was substantial compliance. Accordingly, the court holds that the plaintiff's failure to file a written complaint in 1965 does not oust this court of jurisdiction.

42 USCA, § 2000-e-5(d) states inter alia: "In the case

of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in sub-section (b) of this section, such charge shall be filed by the person aggrieved within 210 days after the alleged unlawful employment practice occurred, or within 30 days after receiving notice that the state or local agency has terminated the proceedings under the State or local law, whichever is earlier. . . ."

The Civil Rights Commission of the State of Colorado terminated its proceeding on July 30, 1965, and so notified Mr. Love. No further contact was had by Mr. Love with the State Commission. He filed his complaint with the EEOC on May 23, 1966.

It is the court's opinion that the state proceedings were effectively terminated on July 30, 1965, and that the plaintiff's period within which to file a complaint with the EEOC commenced on July 31, 1965. As Mr. Love did not file with the EEOC until May 23, 1966, it is the court's conclusion that the charge and complaint before the EEOC was not filed within the time required by 42 USCA, § 2000-e-5(d), and that the EEOC did not have jurisdiction to consider Mr. Love's charge. As Mr. Love's charge was not timely filed with that body, this court is also without jurisdiction to hear the complaint herein.

Furthermore, as to the plaintiff's claim for injunctive relief, it is obvious that inasmuch as the plaintiff has resigned his position with the defendant, which fact is admitted by the plaintiff, then the request for injunctive relief is moot.

There is no genuine issue of material fact, and the court as a matter of law concludes that the defendant's motion should be granted.

IT IS, THEREFORE, ORDERED that judgment be, and the same is, hereby granted in favor of the defendant, The Pullman Company, and that the judgment of dismissal of this action shall be entered forthwith.

ENTERED this 28th day of February, 1969.

BY THE COURT:
/s/ Alfred A. Arraj
United States District Judge

[Entered on the docket, Feb. 28, 1969, G. Walter Bowman, Clerk]

United States District Court
FOR THE District of Colorado

Civil Action No. C-899

[Filed, Apr. 17, 1969, G. Walter Bowman, Clerk]

EARL A. LOVE,
Plaintiff,

vs.

PULLMAN COMPANY,
Defendant.

OFFICIAL TRANSCRIPT

Proceedings before the HONORABLE ALFRED A. ARRAJ, Chief Judge, United States District Court for the District of Colorado, beginning at 11:00 o'clock a.m., in Courtroom A, United States Courthouse, Denver, Colorado, on the 14th day of February, 1969.

APPEARANCES:

HUGH J. MCCLEARN, Attorney at Law, Denver, Colorado, appearing for the Plaintiff.

EDWARD C. EPPICH, Attorney at Law, Denver, Colorado, appearing for the Defendant.

PROCEEDINGS

The Court: Civil Action 899, Love vs. Pullman Company. This matter is before the Court on defendant's motion to dismiss. Plaintiff appears by Mr. McClearn. Defendant appears by Mr. Eppich.

We have read and considered your briefs, gentlemen, and I propose, unless I am shown some reason why I shouldn't, to consider the motion to dismiss as a motion for summary judgment, and so with that in mind you may proceed.

All right, Mr. Eppich.

Mr. Eppich: If it please the Court, I think the first thing to take up is the statement of facts that I have submitted, so that the record is clear that these are uncontradicted

facts. I have discussed this with Mr. McClearn and I believe we can stipulate on it, can we not, that with the exception of Statement of Fact Number 1, and I am referring to the memorandum brief filed on behalf of the defendant—

The Court: Excuse me.

Mr. Eppich: Excuse me, sir?

The Court: Let me get that here. All right, now, I have it.

Mr. Eppich: What I was attempting to do there was merely set forth a summary of the plaintiff's complaint. I would submit that the complaint itself as well as the charge filed with the EEOC and submitted by affidavit by Mr. Love would speak for itself.

If Mr. McClearn has any change in semantics, I certainly would take that, but I would submit to the Court that those documents speak for themselves.

I believe we are agreed that Paragraph 2 is a stipulated fact, is that correct, Mr. McClearn?

Mr. McClearn: Yes.

Mr. Eppich: With regard to Paragraph 3, Mr. McClearn has some reservation. I submit that Paragraph 3 may not even be material here. I do, however, refer the Court to page 11 and page 14 of the deposition of James Reynolds.

The Court: All right.

Mr. Eppich: Which I believe substantiates that statement. Paragraph 4 I believe we are agreed upon. Paragraph 5 I believe we are agreed upon. Paragraph numbered 6 I believe we are agreed upon. Paragraph Number 7 I believe we are agreed upon, are we not?

In that regard, I would merely call to the Court's attention page 19 of the deposition of Mr. Reynolds, wherein it is stated: "Question: As far as you are concerned, the matter was closed in July of 1965? Answer: Yes. Question: That is unless Mr. Love wanted his job as conductor? Answer: He never contacted me, so I assume that he didn't."

What is your objection to that, Mr. McClearn?

Mr. McClearn: I just don't know.

The Court: Well, in considering the motion or I mean in considering this as a motion for summary judgment, if there is no evidence that contradicts Mr. Reynolds' statement, why, the Court would accept it, of course.

Mr. Eppich: Thank you, Your Honor.

I believe we are agreed on Number 8, that at no time did Mr. Love file a written complaint?

Mr. McClearn: During that year.

Mr. Eppich: Yes, during 1965. And, Number 9, that Mr. Love filed his complaint with the EEOC either May 23 or July 23. The record is not clear on that.

And Number 10, that Mr. Reynolds corresponded with the EEOC by Exhibit A, which, of course, speaks for itself, and, Number 11, that Mr. Love resigned his position with the Pullman Company in November of 1968.

With those facts in mind, Your Honor, I think that there is very little I can add to the memorandum brief that has been submitted.

Very briefly, it is our position that the Civil Rights Act of 1964 and the provision with which we are concerned here require before this Court has jurisdiction over the subject matter that if the state has a law that prohibits the act complained of and it is agreed that the state here does have such a law, that Mr. Love must first go to the State of Colorado and commence proceeding.

I think it is equally clear that Mr. Love did not file a written complaint with the State of Colorado as required by the state statute, which, of course, is incorporated by the Federal statute.

I think that the language is very clear that this is a jurisdictional prerequisite and goes to the matter of subject matter jurisdiction, and that in many, many cases that have been decided, primarily by the District Courts. Because of the newness of the statute, to my knowledge this question of utilization of state machinery has been before the Court three times only and on each of those three instances the Courts said the statute means what it says, that if the state has an act a man is required to comply with it and this hasn't been done. That would then mean that his claim or his charge with the EEOC is invalid, because they lack jurisdiction, so any action taken by them is for naught and accordingly this Court lacks jurisdiction.

This requirement of filing with the state isn't a procedural nothing. There is some citation that the requirement that the charge be filed with the EEOC under oath is more

of a matter of form and not substance. Frankly, I would be inclined to agree with that.

When it comes to filing a written complaint with the state, though, I don't think it is a matter of form. I think it is a matter of substance. A man has a grievance. He is certainly entitled to present it, but before he can receive meaningful action I should think that he should have to put it in writing, and this isn't an onerous thing. It does give the investigative body of the state as well as the EEOC—and I think it is significant that it is clear that the written complaint must be filed with the EEOC, although it is not necessarily so that it must be sworn to—this investigative body needs something to work with, something in black and white to take to the Commission, to take to the employer. The employer is entitled to have something in writing so he knows what he is charged with, but I do not think it is a matter of form. I think it is a matter of substance.

Also, I think it is quite clear that the act requires that this be done. It is very unequivocal.

Counsel has suggested that when Mr. Reynolds wrote the EEOC in June of 1966 that there was some sort of waiver. It didn't make sense to me either, Your Honor. I first submit that we are talking about subject matter jurisdiction. It is my understanding that subject matter jurisdiction cannot be waived, cannot even be consented to by the parties. As a matter of fact, it can be raised at any time.

Referring to Volume 1-A of Barron and Holtzoff, Section 370, I don't really think a citation of authorities is necessary. What we are talking about is jurisdiction.

As well-meaning as the civil rights director of the State of Colorado may be, as well-meaning as the EEOC may be, they are still operating under mandates of the statute, and in this particular instance it is a direction from the United States Congress. I don't think that these men nor Mr. Love nor the Pullman Company, for that matter, have the right to waive a jurisdictional prerequisite set down by the United States Congress. I think it is that simple.

Mr. McClearn hits at the fact that, well, this would kind of be a senseless thing to do because Mr. Love is before the

Colorado Commission in '63 and again before the Commission in '65 and he wasn't satisfied, so why should he have to go back and file a written complaint with them?

As I said before, I think the statute requires him to do it and that's all there is to it, but I think it is also significant to note on page 12 of Mr. Reynolds' deposition, wherein this question was asked: "Did you at this time take a written complaint from Mr. Love?" And this is referring to 1965. "Answer: At this time we did not have a written complaint because the results of the first one had been unsatisfactory."

That is—well, let me explain something else here. In pursuit of civil rights complaints, as you may be aware, through the course of the years the philosophy and outlook on discrimination has changed substantially.

In 1963, as well as in 1965, our commissioners took a straightforward legalistic kind of a look at discrimination, but beginning in 1966 and through the present—I will repeat that—beginning of 1966 and through the present, we have quite a different philosophy toward discrimination and the treatment of Mr. Love's case would be significantly different from what it was in '63 because we have recognized adopted definitions of discrimination that are substantially different.

Well, I would submit that had Mr. Love filed his complaint in '66 with the state commission rather than going directly to the EEOC that he certainly would have had a full hearing. He certainly would have had fair treatment, and I think as Congress intended the State would have had the first opportunity to straighten this matter out if there were in fact something to straighten out.

Then, of course, Mr. Love could have gone to the EEOC regardless of what the state decided because that's what the act says, but, nevertheless, he didn't go to the state.

The Court: You say he didn't go to the EEOC?

Mr. Eppich: He went to EEOC, yes, sir. Yes, he did.

The Court: How about the timing of his complaint there?

Mr. Eppich: We question that, yes, sir, for this reason, that—well, first of all, having not complied with the state machinery, it is our position he had no right to go to the EEOC anyway, but assuming that through some sort of substantial compliance or theory I haven't found in the law

books yet which pertains to this, that it be considered that Mr. Love did satisfy the substance of utilization of state machinery, I think the record is quite clear that in July of 1965, July 30th of 1965, the State of Colorado had completed whatever it was going to do for Mr. Love and so advised him. That being the——

The Court: How did they advise him?

Mr. Eppich: That's by letter dated July 30, 1965, Your Honor, and I believe that the deposition of Mr. Reynolds also states that he was orally advised of it.

The Court: Do we have that letter?

Mr. Eppich: Yes, that's Deposition Exhibit Number 1. It states as follows: "The discussion we held with the Pullman officials led to the following: Seniority is lost if a person changes categories. If an "in charge" porter becomes a Pullman conductor, he will become the lowest rank conductor and will be subjected to layoff immediately based on his new status. It was my understanding that none of your people would be interested in a pay cut. If there are those who would not object, I will be happy to pursue the case to an end."

The Court: How do you interpret that last sentence?

Mr. Eppich: Pardon me, sir?

The Court: Can you interpret that last sentence for me? I don't quite understand it. "If there are those who would not object ——"

Mr. Eppich: Yes, sir.

The Court: "I would be happy to pursue it."

Mr. Eppich: I think it boils down to this, that the Pullman Company would make the porters in charge according to Mr. Reynolds conductors, but due to the union agreements and the seniority agreements, if they become a conductor they would then go to the bottom of the seniority list.

Well, the railroads have been going, as far as passenger service, have been having a rough go of it over the years, and as a result many of the long-term conductors themselves, whether they be white or black, have been furloughed simply because the work isn't there, so the effect of it would be that a porter who had a high seniority right and was being employed, when he became a conductor, he would lose those seniority rights and this then, Mr. Reynolds

says, "We can get you the job in effect, but it is a hollow thing," but that's frankly how I interpret it.

The Court: Well, I didn't ask you how you interpreted his letter. I asked you how you interpreted the last sentence, "If there are those who would not object, I would be happy to pursue the case to the end." I don't understand.

Mr. Eppich: In other words, Mr. Reynolds—he would then get the jobs as Pullman conductors for them.

The Court: I see. I see, they would not object to being placed at the tail end?

Mr. Eppich: Yes.

The Court: Yes, all right. I wanted that——

Mr. Eppich: So, it having been terminated there, Mr. Love then has 30 days or 210 days within which to go to the EEOC. Now, whether 30 days is used or 210 days is used, he still did not file with the EEOC within the time that the statute requires.

As far as the question of mootness goes, Mr. Love has resigned his position, so certainly any injunctive relief he is seeking is clearly moot.

The Court: Yes.

Mr. Eppich: As far as his claim for back wages, the best I can say there is that conceivably there was a period in July at the best, a month, where if everything he says is correct, he would be entitled to his back wages. I think that is very close, Your Honor, to being certainly a demittimus.

I do not think that he can go beyond the effective date of the act and seek back wages. To do so would be to say, "Pullman Company, what you did up to 1965 was lawful and up to ——"

Excuse me?

The Court: Can he maintain his claim for back wages if the Court does not have jurisdiction to entertain his basic claim?

Mr. Eppich: No, sir, if the Court doesn't have jurisdiction to the basic claim, it certainly doesn't have jurisdiction to adjudicate back wages. At least, not under this proceeding.

Now, conceivably, there is some other statute or some

common law cause of action he may have, but certainly not under Title 7.

The Court: All right.

Mr. Eppich: Thank you.

The Court: Mr. McClearn.

Mr. McClearn: May it please the Court, the plaintiff, Mr. Earl A. Love, who is with me in court this morning, has worked for the Pullman Company for essentially all his adult life. He has been a porter during that period of time and while perhaps not a sophisticated man, my contacts with him indicate certainly he is a gentleman, and I think this case illustrates he certainly is a tenacious man.

He has felt for many years that he and his colleagues, all of whom are negroes and all of whom are porters working for the Pullman Company, have been discriminated against because of the fact that they were negroes. His complaint has not been that he wants to be a conductor. He has never claimed that he wanted to be a conductor. He simply has felt that he did the same work that a conductor did but didn't get paid the same wages, and that the reason he didn't get paid the same wages was that he was a negro and he wanted to get the same wages that white people did who performed the same work, be they called whatever the company wants to call them.

He sought in 1963 to get the Colorado Civil Rights Commission to entertain and rectify his complaint. The records with respect to that are not available. They apparently have been lost, but it is the clear recollection of everyone involved that he did make a complaint at that time.

He came back to the Colorado Civil Rights Commission and made another complaint in 1965, and it is everyone's recollection, clear recollection, that he did that, and in 1966 he complained to the Equal Employment Opportunity Commission.

Now, the Pullman Company was aware of all this. They were consulted, and in 1966 they were made a part of the proceedings brought by the Equal Employment Opportunity Commission.

The Federal officials in 1966 contacted the Colorado Civil Rights Commission and were advised by that body that they, the Colorado Civil Rights Commission, did not feel they wanted to entertain another complaint from Mr.

Reynolds and urged the EEOC to proceed, which they did. They investigated this matter for two years, during which time Mr. Love waited. They determined that there was probable cause to believe that the defendant in this action had discriminated against him because of his race and, as I say, during this two year period the Pullman Company was fully aware of what was going on. At no time did the Pullman Company ever object to the EEOC proceeding. At no time did they ever indicate that Mr. Love had not properly exhausted whatever rights he had under the Colorado Civil Rights Act.

The Pullman Company was asked to conciliate and refused to do so. Pursuant to the statute, Mr. Love then was notified by the EEOC that he had 30 days within which to negotiate an action in this court. He did so, and has proceeded as best he can to assert his claim. He has tried that at the state level. He has tried it with the Federal administrative level and now he seeks to do it here.

Now, some six years after he initially tried to get this claim going, the defendant wants him to be thrown out of this court because he didn't or perhaps someone back down the line in the administrative process didn't fill out whatever papers the defendant thinks are appropriate.

Well, I do not think that there is any jurisdictional question before this Court.

The Court: Well, there certainly is one with reference to his not having filed the complaint with 210 days from the June 30th of '65 date. That is, file a complaint with the EEOC.

Mr. McClearn: Your Honor, the nature of our claim, may I reiterate, is not that Mr. Love was discriminated against on any particular day. Mr. Love is complaining and his allegation is that he has been and was discriminated against every day he worked for that Pullman Company from 1951 until November 17, 1968, when he resigned.

The Court: Well, there has to be a starting point for these statutory periods to commence to run or it would make so sense. Certainly, in a sense his complaint was a continuing one, but he has to start some place and he did start. You said he started in '63 with the Colorado Commission and he went back in '65 to the Colorado Commission and you said he complained to the EEOC, so some

place he had to take a stand and say this, because this 210 days or this 30 day period must mean something.

Mr. McClearn: Your Honor, I don't know exactly the sequence of events and they haven't been fully explored here. Mr. Love signed a written complaint before the EEOC on January 23, 1966, or excuse me, July 23, excuse me.

The Court: Yes.

Mr. McClearn: Prior to that date, he had obviously contacted the EEOC, because they contacted Mr. Reynolds and on June 30 I think is the date and I may be off a day or so, Mr. Reynolds advised them that he did not want to entertain any further complaint and our position is that Mr. Love's complaint is just as current on that day and on the day he filed his complaint with the EEOC as it was on any other prior time.

I think the date in 1965 when he—there is a letter in the file from Mr. Reynolds—has no meaning with respect to cutting off his complaint. This isn't a case where he was transferred and his claiming that he was improperly transferred because——

The Court: What you are saying is as long as this man worked he didn't have to pay any attention to the time sequences or time requirements that the statute sets out? This is what I get out of your argument.

Mr. McClearn: No, my argument would be this and I don't know, we haven't come to the question of how much in the way of back wages he might be entitled to receive, but our position is that the discrimination which he alleges was being perpetrated against him, occurred, on every day and he had the right to make a complaint on any given day, and he consistently tried to do it for some five years and was able to trigger administrative action only when he finally filed his complaint with the EEOC on July 23, 1966.

I don't know how much in the way of assuming that he successfully establishes the liability here, I don't know what his damages might be, but I think that the nature of his claim is such that he could assert it and certainly tried to assert it on numerous occasions, but he could assert it any time, any time he could get someone to listen to him. The time limits here I just don't think make sense. As I say,

he kept trying to assert this claim, got no action to his way of thinking, and I think he has that right.

In other words, without getting into the merits of whatever the state agency did, he was not satisfied with it. He wanted to pursue it further. He did pursue it further, and in 1966 he finally pursued it to the EEOC. They entertained that complaint. Whether or not they properly entertained that complaint is a matter that I don't think is of concern to this Court. That may be something that——

The Court: It is, to the extent that jurisdiction was predicated on the law which puts cut off dates in it.

Mr. McClearn: Well, our feeling certainly is that the statute requires the plaintiff in this case to proceed through the EEOC, but I think it is manifestly clear to the Court that you have no way of overseeing the initiation of the complaint by the plaintiff at the EEOC. The matter doesn't get to this Court until they have exhausted their proceedings and I urge the Court's careful consideration of the Seventh Circuit case because I think that there is great similarity between the oath requirement in that case and the filing requirement here. The defendant is claiming that we didn't file the right papers in the state agency, and I maintain and I think that the——

The Court: You don't need to argue that. I am satisfied that that particular portion of your jurisdictional basis has been substantially complied with. As far as the state agency is concerned. But I am not satisfied as to the 30 day or 210 day period after the state closed its case or that's the claim of the defendant, it was closed, or after the July 30, 1965 date. That's the point that really concerns me.

Mr. McClearn: Let me then again, Your Honor, urge that you consider the type of claim that this gentleman is making because I think that——

The Court: Well, the statute doesn't distinguish it.

Mr. McClearn: I appreciate that, but it is sort of in the nature of a continuing argument, and as Your Honor is well aware, there are two schools of thought on where you run the statute of limitations on a continuing open account, but I think here we are not talking about an instance. The cases that we have cited to you and I think—well, let me go back to that a little bit. The Quarles case, which I cite

to you in my memorandum, is a case which I think might be analogous in the sense that there you had two hiring practices, one for negroes and one for whites, in a cigarette factory in South Carolina, which had resulted over a long period of years in an imbalance—not an imbalance, but a discriminatory effect in the level of the employees.

Well, now, this discrimination had gone on for years. There was nothing there that you could point your finger to and this is our case here. The effect that we complain about is an historical effect. The conductors had a no negro clause in their constitution and by-laws until just recent years. Negroes were not permitted to be in white unions in railroads. That's why Mr. Love was a porter. That's why porters had their own union. We are talking about 30 years of railroad history here which has resulted in, in effect, white conductors and black porters doing the same work, and that's what we complain about. We say that that history has resulted in an improper effect on Mr. Love and that that effect continues every day or continued every day that he worked for the Pullman Company, and, therefore, his complaint was for the discrimination that was occurring to him on a daily basis.

I don't think that it is fair to consider that his time to complain ran from the date when he finally talked to someone. Here he talked to people on at least three separate occasions, not talking about any intervening conversations that he might have had in an attempt to pursue his matter, but he talked in '63, he talked in '65, he talked again in '66. It wasn't until '66 that he was able to actually get someone to pay any attention to him in the sense that he wanted attention paid to him. When the EEOC accepted his complaint on July 23, 1966, and I think that if you will review that complaint, on its face it says it is a continuing discrimination. When did this discrimination take place? January, 1966, and continuing.

The Court: Well, I understand that it is continuing, but that doesn't mean to me that the time prescribed in the statute does not have to be complied with. It would be meaningless to—because most discrimination is continuing. I mean on a racial discrimination. It is continuing, we are learning, and I think truthfully that it has continued for over 200 years in America, so that's a fact we are not

concerned with here. We are concerned with whether or not the complaint that this man made was made at the times and to the agents that the law prescribed, and it must start sometime. There must be sometime when he has to move from the state board to the Federal board of the EEOC, and that's what Congress wrote into the 2000(e)(5), I believe it is.

Mr. McClearn: Well, then, our argument must be and we certainly do urge that the Court consider that our complaint was formally rejected by the Colorado Civil Rights Commission on—I just don't have that letter right before me. Is it June 1?

Mr. Eppich: Yes.

Mr. McClearn: June 1, 1966, when Mr. Reynolds wrote to the EEOC and told them to proceed and that they were deferring to the EEOC.

Thereafter, and it is not clear and I can only hypothesize here, but the formal decision rendered by the EEOC indicates that Mr. Love's complaint was May 23 or thereabouts, filed on May 23. Well, I can only suppose that's when Mr. Love first approached the EEOC. They thereafter contacted Mr. Reynolds, who on June 1 rejected their attempt to refer it back to him and then he actually signed his formal complaint on July 23 as is indicated on I think Mr. Love's affidavit.

Thank you.

The Court: All right.

Mr. McClearn: I don't quite understand the Court's reference to my basic claim, the colloquy between opposing counsel and you with respect to not having jurisdiction over Mr. Love's claim for money damages if you did not have jurisdiction over the main claim. I don't quite understand your reference and therefore I am at a little of a loss if I should make a comment or not.

The Court: Well, counsel, Mr. Eppich, stated something to the effect that if the claim is as he makes it here, why, there may be some back wages due, and I was just trying to find out from him. He said they were demittimus, I believe was his term. I was trying to find out from him if it was his position that this were a separate claim that wasn't governed by the same statutory provision as the other portion of the claim is concerned. That is the other refer-

ence. You seek injunction. That's one of the things that you seek here and certainly injunction and wages are different. Injunctive relief and monetary relief are two different things. I was just trying to get it clear, that's all. You are welcome to discuss it.

Mr. McClearn: No, this matter is before you under the 1964 Civil Rights Act for what remedies are appropriate.

The Court: Well, first, gentlemen, as I indicated to you, we had studied your briefs and, of course, the disposition——

Mr. McClearn: Excuse me, Your Honor, would it be helpful to have Mr. Love testify with respect to how he proceeded with his claim to the EEOC here, the one that culminated in the signed claim, because I would certainly want Your Honor to be fully apprised with the facts with respect to that if it is your intent to rule.

The Court: Well, it is my intent to rule, but I don't know how this can help, unless we set it down for an evidentiary hearing, because there may be some other evidence from the other side, too, you see. I have no—there is no doubt in my mind, but what there were some informal either conversations or maybe correspondence, I don't know, between Mr. Love and the EEOC, because as you pointed out, it is obvious they knew about it, because they contacted Reynolds, and he said, that, "You go ahead, we are not going to have anything more to do with it," or something to this effect, so there is no question in my mind that he contacted them. The question is whether he complied with the law. The law says he shall file a complaint and so if you have some evidence that he filed a complaint before May 23, 1966, I would listen to it. I would be glad to have you furnish it.

Mr. McClearn: I think we don't have that, but if I——

(Counsel consulted with plaintiff.)

Mr. McClearn: We have nothing further, Your Honor.

The Court: All right. Well, first, as to the claim for injunctive relief, why, it is obvious now that inasmuch as the plaintiff has resigned his position and that fact is admitted that question is moot.

Now, as to the other points, the defendant raises the point that the plaintiff hasn't complied with the requirements of the statute; that is the Colorado law here.

There is evidence that he did file a written complaint with the Commission sometime in '63, and apparently the claim was not resolved, that the Commission was then contacted again in 1965 by Mr. Love and he restated his complaint to the Commission, but no written complaint was filed at that time.

However, Mr. Reynolds, the director and head of the Colorado Commission, did contact the Pullman Company and apparently they said they would promote Mr. Love to the position of a conductor, then he would probably be laid off because of the seniority rules in effect.

Then, on July 30 of '65, Reynolds wrote Mr. Love advising him of this.

Now, I think that although he didn't file another formal complaint in '65, I think that he, Mr. Love, did substantially comply with the filing of the complaint before the Colorado Commission, because Reynolds, who had had a written complaint, apparently reopened the matter, because he did then take the matter up with Pullman Company and although Mr. Love hasn't or didn't comply strictly with the literal wording of the statute, he did, however, make substantial compliance.

I think it is fair to say that the theory or the principle behind the statute here that we are concerned with, the Federal statute, is that if a state has an anti-discrimination law that a person aggrieved must exhaust his remedies through the state channel before he can come into the Federal Court, and this he did all right. I think he effectively exhausted his remedy before the State Commission.

For those reasons, I do not think his failure to file the second written complaint or the written complaint in 1965 ousts this court of jurisdiction on that ground.

Now, the charge before the EEOC or the complaint there was filed May 23 of '66.

Now, as I indicated in my colloquy with counsel for the plaintiff, it is the Court's feeling that there must be some starting time for the beginning of these cut-off periods, the 30 day period or the 210 day period, whichever is applicable, and it is my holding and conclusion that period, the 210 day period, started on July 31 of 1965, after the letter was sent to Mr. Love by Mr. Reynolds of the State Commission.

I think that this effectively terminated the state's action,

because according to the records that are before me, no further contact was made by Mr. Love to the State Commission, so from July 31, 1965 to May 23 of 1966 is more than 210 days, so I must conclude that the charge and complaint before the EEOC was not timely filed and that the EEOC, therefore, did not have jurisdiction to consider the claim, and, thus, in view of the fact that it was not timely filed and that body did not have jurisdiction, then this Court is without jurisdiction to hear the complaint, and treating the motion to dismiss as a motion for summary judgment, the Court finds in favor of the defendants against the plaintiff for the reasons I have given.

The Court: Do either counsel have anything further?

Mr. Eppich: No, on behalf of defendant.

Mr. McClearn: Nothing, Your Honor.

The Court: You will prepare an appropriate order?

Mr. Eppich: Yes, I will.

The Court: Court will be in recess.

(Whereupon, the proceedings were concluded.)

REPORTER'S CERTIFICATE

I, Donna G. Spencer, Certified Shorthand Reporter and Official Reporter to this Court, do hereby certify that I was present at and reported in shorthand the proceedings in the foregoing matter;

Further, that I thereafter reduced my shorthand notes to typewritten form, comprising the foregoing Official Transcript;

Further, that the foregoing Official Transcript is a full and accurate record of the proceedings in the foregoing matter at the time and place set forth.

Dated at Denver, Colorado, this 31st day of March, 1969.

/s/ Donna G. Spencer
DONNA G. SPENCER
Certified Shorthand Reporter

In the United States District Court
FOR THE District of Colorado

Civil Action No. C-899

[Filed Jan. 9, 1969, G. Walter Bowman, Clerk]

EARL A. LOVE,

Plaintiff,

vs.

THE PULLMAN COMPANY, an Illinois Corporation,

Defendant.

DEPOSITION OF
James F. Reynolds
(Taken by Defendant)
December 5, 1968

PURSUANT TO SUBPOENA and SUBPOENA DUCES TECUM, the deposition of JAMES F. REYNOLDS called for examination by the Defendant THE PULLMAN COMPANY, was taken at 1908 Mile High Center, Denver, Colorado, starting at 10:15 o'clock, A.M., on the fifth day of December, 1968, before GEORGE H. TENCICH, a Notary Public and Certified Shorthand Reporter in and for the State of Colorado;

The Plaintiff appears in person and by his attorney, HUGH J. McCLEARN, ESQ, 1310 Denver Club Building, Denver, Colorado;

The Defendant appears by its attorneys, NEFF, SWANSON, and MYER, by EDWARD C. EPPICH, ESQ, 1908 Mile High Center, Denver, Colorado;

WHEREUPON, the following proceedings were had:

[2] PROCEEDINGS

IT IS STIPULATED and agreed by counsel for the respective parties that even though counsel should not object or except to any questions asked upon this examination or answers given thereto, all objections as to relevancy, competency and materiality, except as to the form of the question, may be made at the time of trial should counsel for either party desire to make such objections at the time of trial, and that the deposition is taken pursuant to the Federal Rules of Civil Procedure.

* * *

JAMES E. REYNOLDS, called as a witness for cross-examination under the Rules by the Defendant, being first duly sworn according to law, was examined and testified on his oath as follows:

CROSS-EXAMINATION

By MR. EPPICH:

Q. I believe that Mr. Reynolds is here today due to a Subpoena Duces Tecum which was originally scheduled for November 14, until today, December 5, 1968, but due to illness such as the flu, this has been continued to this date by stipulation of the parties.

Would you state your name and address, please?

A. James F. Reynolds. 3333 South Wabash Court, Denver, Colorado.

[3] Q. Are you employed, sir?

A. I am.

Q. By whom are you employed, and what is your position?

A. The State of Colorado as Director of the Civil Rights Commission.

Q. How long have you held this position?

A. Since May 18, 1963.

Q. The Colorado Civil Rights Commission is a creature of statute. Is that correct?

A. Yes.

Q. More specifically is that C.R.S. 80-21-1?

A. I think that is the correct one.

Q. What are your duties as Civil Rights Director?

A. It is to carry out the policies promulgated by the Commissioners and to enforce, direct the enforcement of the three statutes under which the Commission operates.

Q. What are those three statutes, if you know, sir, either by popular name, or otherwise?

A. They are anti-discrimination laws against discrimination in places of public accommodation and against discrimination in employment, and against discrimination in housing.

Q. Are these three separate statutes, if you know?

A. Yes, they are.

[4] Q. Nevertheless you have jurisdiction under all three statutes?

A. Yes. That is correct.

Q. Have these statutes been in effect since you were appointed Civil Rights Commissioner?

A. They were all in effect when I was appointed, yes.

Q. Do you know, sir, how long they have been the law of the State of Colorado?

A. The Public Accommodations Law has been a law since 1895.

The Employment Law since 1957. The Housing Law since 1959.

Q. As I understand it, sir, your job is to see that the provisions of the laws are enforced, or at least enforced at the administrative level?

A. That is correct.

Q. Mr. Reynolds, what you are concerned with in this law is a job basis discrimination based upon race. Is that a correct statement, Mr. Reynolds?

A. Yes.

Q. Colorado has such a law, do they not?

A. Yes, that is correct.

Q. Again it is your job to see that that law is enforced?

[5] A. Yes.

Q. Calling your attention to Earl Love, the plaintiff in this action ——

Mr. McLearn: We might note that he is present?

Mr. Eppich: Certainly.

Mr. McLearn: He is present in the room. Mr. Reynolds can identify him.

Mr. Eppich: I will start over again.

You know Mr. Earl Love, the plaintiff in this action?

A. Yes, I do.

Q. Pursuant to the Subpoena, and also to our agreement, we have talked—that is, you and I have talked before about these records, is that correct?

A. Yes.

Q. Have you brought with you all your documents, files, and records pertaining to Mr. Love?

A. I don't think so. I am almost positive there are other records, but we have not found them up to this time.

Q. Have you looked for them sir?

A. I have. Yes.

Q. Where have you looked?

A. In our records in the basement of the State Services Building, and in the State Archives.

Q. Where else would the records be kept?

[6] A. They would be in one of those two places, or within the files in our office.

Q. Have you checked the files within your office?

A. Yes. There is a box missing of employment records from 1962-1963, and we propose to institute a more diligent hunt for that box this weekend.

Q. Would it be a fair statement to say then that you have been able to account for the records, except for the years 1962-1963?

A. Yes.

Q. That is, as it pertains to Mr. Love, is that correct——

A. Yes.

Q. May I please examine the records that you have been able to find as concerns Mr. Love, and his alleged discrimination by the Pullman Company?

A. Let me correct that. I am almost sure there is a record somewhere in our files, or a letter concerning Mr. Love to the EEOC that I have not found either. It was—it would have been dated in 1965 some time.

(Whereupon various documents were produced by the deponent for Mr. Eppich's inspection.)

A. I am a little embarrassed about this, but we changed office managers, and people file by subjection, and nobody can ever find anything filed by anybody else under that system.

[7] Q. Let's go off the record.

(Whereupon there was unrecorded discussion)

Q. Mr. Reynolds, when did you first become acquainted with Mr. Love?

A. The day I walked in the office, I think, to take over the job.

Q. Would that have been about May 18, 1963?

A. Yes.

Q. How did this meeting come about?

A. Mr. Love and two or three other gentlemen who were with him were brought in to see me by a man who was on the staff, whose name was Galoway Denny.

Q. Is Mr. Denny still on the staff?

A. No. He works for the Bureau of Apprenticeship and Training.

Q. Is that in Denver?

A. Yes.

Q. Is that a State, or Federal job?

A. Federal job.

Q. Proceed.

A. It appears that Mr. Love and the gentlemen with him were concerned about the problems of discrimination within the railroad as to the difference between being a Porter-In-Charge, and a Railroad Conductor, or a Pullman Conductor—I am not sure which it was—but any way after some discussion I instructed Mr. Denny to take a complaint [8] from Mr. Love and any of the others that wished to file one and we would proceed from there.

Q. This would have been in May, 1963?

A. May, 1963. Yes.

Q. Allright, sir.

This complaint would have been merely a statement by Mr. Love as to the facts concerning the discrimination?

A. That is correct.

Q. What happened then, if you know?

A. I really don't know what happened after that. I don't recall having had any further conversations personnally with Mr. Love.

Let me explain something here that might be helpful: Under the system that we were operating under, and of course, remember I was brand new on the job, Mr. Love came in the same day I did, and the Deputy Director, who was a Mr. Edward Torrones actually handled the complaint processing so that a complaint filed by Mr. Love would not necessarily have been returned to me.

It could have been, but I don't remember having anything else to do with it after that one conference with Mr. Love.

Mr. Denny and the two or three other gentlemen who were with him then——

[9] Q. Well, sir, excuse me. Would it be fair to say that your job as Director is to initially examine the complaint, then assign them to your assistants for handling?

A. No. I am saying to you that that was done by Mr. Torrones, and it is pretty much the same way we operate

today: That is, this is the function of the Deputy Director, and I review complaints after the investigation has been completed and make a finding of Probable Cause or No Probable Cause.

I am just saying that if I did that with Mr. Love's complaint, I don't remember it.

(WHEREUPON, Defendant's Deposition Exhibits 1, 2, and 3 were marked for identification)

Q. Mr. Reynolds, I will now hand you what is marked as Defendant's Deposition Exhibit Number One and ask you to examine that.

A. Yes.

Q. Have you now examined it, sir?

A. Yes.

Q. Is that a true and complete copy of the file that you have produced here pursuant to the Subpoena Duces Tecum?

A. Yes.

Q. Do you have any objections if we use that document instead of the original so that Mr. Reynolds can have his [10] file back?

Mr. McLearn: No.

Mr. Eppich: Mr. Reynolds, we have a letter dated July 30, 1965, addressed to Mr. Love.

Is that signed by you, sir?

A. Yes, it is.

Q. Was this letter written as a result of the investigation by the Colorado Civil Rights Commission, or Colorado Civil Rights Department?

A. No. Mr. Love returned to our office some time in 1965.

Q. He did?

A. Yes. He stated that he was not happy with the results produced by us previously, and I discussed it with the Commissioners and explained to them the ramifications of Mr. Love's complaint if pursued.

And the Commissioners after some discussion directed me to contact the Pullman officials and discuss the matter with them.

They declined at that time to carry Mr. Love's complaint to a Hearing.

As the result of that instruction from the Commissioners

I had a talk with Mr. Huffendick. In my discussions with Mr. Huffendick he literally admitted to the differences between a Porter-In-Charge and a Conductor and informed [11] me that the railroad would at that point change Mr. Love from a Porter-In-Charge to a Conductor, but, of course, stating that if they did, that they already had a lay-off list of Conductors that was rather extensive; and that upon change of category Mr. Love would go to the lay-off list.

Of course, Mr. Love was not interested in going to the lay-off list of a Conductor from a working Porter-In-Charge.

Q. The affect of that would be that he would have a title, but wouldn't have any pay.

A. No job.

Q. Let me back up a moment: In 1963 you conducted an investigation, and then evidently you concluded the investigation, is that correct?

A. Yes.

Q. You so advised Mr. Love, is that correct?

A. Yes.

Q. Then in 1965 it must have been prior to July 30 of 1965 that Mr. Love then came back to your office and in effect said "I am still not satisfied."

A. Yes.

Q. Do you have any idea when this would have been: Was that in May, June, or July of 1965?

A. I really don't remember.

Q. In any event it was prior to July 30th?

[12] A. Yes.

Q. Did you at this time take a written complaint from Mr. Love?

A. At that time we did not have a written complaint because the results of the first one had been unsatisfactory. That is—well, let me explain something else here: In pursuit of civil rights complaints as you may be aware, through the course of the years the philosophy and the outlook on discrimination has changed substantially. In 1963 as well as in 1965 our Commissioners took a straight forward legalistic kind of a look at discrimination; but beginning in 1966, and through the present, we have quite a different philosophy towards discrimination and the treatment of Mr.

Love's case today would be significantly different from what it was in 1963 because we have recognized, and adopted definitions of discrimination that are substantially different.

We recognize today for example the patterns of discrimination. We recognize today discriminatory agreements entered into between labor and management to the detriment of minority people, and this would apply to Mr. Love's case, and it was not a philosophical view that we held at that time.

And, of course, we also today accept cases of discrimination based upon differential treatment which implies discrimination without actually being what could be defined legally as discrimination. That is, the result that differential [13] treatment leads to an unfair something to the person receiving it, and these kind of views we didn't operate under in 1963.

Q. Would it be fair to say that the policies of the Colorado Civil Rights Commission has changed over the years?

A. Yes.

Q. Now, in going back to your letter of July 30, 1965, and I am also talking about the 1965 meeting that you had with Mr. Love, you literally went to bat for him, didn't you?

A. Yes. We attempted to.

Q. Well, you went down and talked to the Pullman Company, did you not?

A. Yes.

Q. That would be Mr. Huffendick whom you previously referred to?

A. Yes.

Q. The substance of that conference was that Mr. Huffendick said that Mr. Love could be promoted, if that is the right word, or at least his job classification changed from Porter-In-Charge, to Conductor?

A. Yes.

Q. But that if he did that, he would lose his seniority rights?

A. Yes.

[14] Q. Then he would go to the bottom of the list as a Conductor?

A. That is correct.

Q. Due to the fact that there were several Conductors who had been furloughed, which in railway parlance is laid

off, then Mr. Love would in effect have been unemployed?

A. That was Mr. Huffendick's position.

Q. You then presented your findings to the Civil Rights Commission of the State of Colorado?

A. Yes, and to Mr. Love.

Q. What were your findings. Now, I am referring to July of 1965.

A. As I said, Mr. Huffendick literally admitted to the fact that the practices as pertains——

Q. Excuse me, sir. Just what were your findings?

A. Well, now, let me reiterate what I said to you, that we did not take another complaint from Mr. Love in 1965. I don't remember what the findings were in 1963, but pursuant to what happened, I assumed we made a negative finding in 1965 because Mr. Love did return in 1965 stating that he was not happy and that he wished us to take further action.

Q. By "negative findings" do you mean that you found no discrimination in 1963?

A. I assume that we did, but I don't remember specifically what we did find in 1963.

[15] Q. Allright, sir.

Then in 1965 when you went to the Commission they advised you after you explained the facts as you knew them, that they again would take no action, is that correct?

A. Yes.

Q. Pursuant to that discussion with the Commissioners did you then issue your letter of July 30, 1965, which is page 1 of Defendant's Deposition Exhibit #1, and presented that to Mr. Love?

A. Yes.

Q. This then would be advising him that the Colorado Civil Rights Commission was going to take no further action?

A. Yes, unless he wanted to accept the conditions that Mr. Huffendick stated would happen if he were promoted, if you call that a promotion.

Q. Allright, sir. I am not clear on that.

A. Well, I am trying to say that Mr. Huffendick said "well, yes, the treatment—the practices we follow were caused by agreement between the union and the company, but we are not happy today with it, and we will correct it,

if Mr. Love so desires; but if we correct it, and we promote him to a Conductor, the lay-off list is extensive and we will name him a Conductor and he will go to the bottom of the seniority list of Conductors, rather than the top of the list as a Porter-In-Charge, or a Porter, and at that point he [16] will be without a job."

Q. Allright, sir.

A. And I so informed Mr. Love of this conference.

Q. Then would it be fair to say as a result of your work around July of 1965 that you were able to get Mr. Love the job of Conductor, but he would have pay problems if he took it: And you so advised Mr. Love and said in effect that "This is all the Civil Rights Commission of the State of Colorado can do, or will do"?

A. Well, yes. No. No. I didn't say that was all we would do but I said we would proceed and take whatever action was necessary to have him made a Conductor.

Q. That is, if this is what he wanted?

A. Yes. If that is what he wanted.

Q. What, if anything, did he advise you in this connection?

A. I think the next I heard from Mr. Love was indirectly being called upon by a representative of the EEOC from Dallas, Texas. I don't remember that Mr. Love responded to me—to my letter directly but——

Q. Do you know when it was that you heard from the Dallas office of the EEOC?

A. It was some time after I wrote Mr. Love. It was the summer of 1965, but I don't remember the date.

[17] Q. Was this an oral, or written contact by the EEOC?

A. It was a visit in my office.

Q. Did you make any sort of notation of it, or any memorandum of it?

A. No. Not of the visit.

Q. Through Mr. McLearn I will not hand you Defendant's Deposition Exhibit #2: I will ask you to examine that.

A. Yes.

Q. Mr. McLearn, is it agreed that Defendant's Deposition Exhibit #2 is a Complaint filed with the EEOC and in which we are concerned with in this civil action in the federal court?

Mr. McLearn: To the best of my knowledge, it is.

Mr. Eppich: I note on this Defendant's Deposition Exhibit #2, Mr. Reynolds, the date is—well, it is dated in July of 1966. Is that correct?

A. Yes. July 23, 1966, I think.

Q. Could this contact you had with the representative from the EEOC have been in the summer of 1966 then, instead of the summer of 1965?

A. Of course, it could have been, but I am almost pretty darn sure that it was in 1965.

Q. So that it is your best recollection that Mr. Love [18] after receiving your letter within two or three months after that time contacted the EEOC, who in turn contacted you?

A. That is the impression I received, yes.

Q. The statement on here, and I am now quoting you paragraph 4 "I have been performing the duties as an "In-Charge" Porter which has duties and responsibilities of a Pullman Conductor, and yet I receive lower wages. I believe that I am being discriminated against because of my race."

That is substantially the same charge that he was making to you, is it not?

A. Yes.

Q. In fact it was the same charge. Is that correct?

A. Pretty much so.

Q. Now, it is the policy, is it not of the EEOC to recognize Colorado as being one of the states which has an anti-discrimination law that satisfies the provisions of Title VII?

A. That is correct.

Q. Now, Mr. Reynolds, I will hand you Defendant's Deposition Exhibit #3 and ask you if that pamphlet is not available in the offices of the Colorado Civil Rights Commission?

A. Yes. I am sure it is.

Q. It is published by United States Government, is it not?

[19] A. Yes.

Q. This particular pamphlet came out in 1965, I believe, did it not?

A. Yes.

Q. Did you do any further investigative work in connec-

tion with Mr. Love's Complaint subsequent to July 30, 1965?

A. No.

Q. Were you requested by the EEOC to conduct such investigation?

A. No.

Q. As far as you are concerned the matter was closed in July, 1965?

A. Yes.

Q. That is, unless Mr. Love wanted his job as Conductor?

A. He never contacted me, so I assume that he didn't.

Q. Mr. Reynolds, we are under somewhat of a time requirement in the Federal Court. I would like to ask you if you could immediately conduct another search for any other records such as correspondence, or any documents of any nature pertaining to Mr. Love's complaint against the Pullman Company that have been filed with your office?

A. I certainly will.

[20] Q. Can you give us an idea how long this will take for you to satisfy yourself there are no more records?

A. As I said, I do plan to have several people fine tooth comb the storeroom this weekend, and whatever we have, we will find it.

Q. Can you advise us by Monday, sir?

A. Yes, I will.

Q. Would that be satisfactory to you, Mr. McLearn?

Mr. McLearn: Surely.

In other words, Jim, if you will drop us a note and let us know if you had any luck in finding any othe documents, that will be helpful.

A. Allright.

Mr. Eppich: We will now ask that the first page of Defendant's Deposition Exhibit #1, and Defendant's Deposition Exhibits #2 and 3 be offered at this time for the purposes of this deposition.

Mr. McLearn: Fine.

Mr. Eppich: You may inquire.

By Mr. McLearn:

Q. Mr. Reynolds, tell us if you know the effective date of the 1964 Civil Rights Act?

A. The effective date of it was July 1, 1965.

Q. This is the Act that created the Equal Employment
[21] Opportunities Commission, is that correct?

A. Yes. That is correct.

Q. What was the nature of the contact that you had with a representative of the Dallas office of the EEOC in connection with Mr. Love?

A. Let me back up and say here for whatever it is worth that prior to the effective date of the 1964 Civil Rights Act, our Commission had been in extensive contact with Mrs. Hernandez, and Mr. Roosevelt, and some other members of the staff of the EEOC, and had made suggestions as to the methods of their operation and other things of this sort, so that upon their forming this, we discussed with them regional offices and we even tried to get a regional office here in Denver.

So, when they came into being officially in 1965, we had had extensive contact with them. So, that when the man came to our office from the office in Dallas, most of our conferences had to do with their plans and what they were going to do, and how they were going to do it.

Incidentally, we sort of talked about Mr. Love.

Q. Is there any doubt in your mind as to the time of this conversation being after the letter of July in 1965?

A. I am sure it was after that, but how long after, I don't know.

Q. What was the nature of your discussion?

Who was this gentleman, by the way?

[22] A. I don't remember his name.

Q. You remember the substance of your conversation with him concerning Mr. Love?

A. I think essentially he asked me what we had done about it and if we planned to pursue it any further. As far as I remember that was the nature of our conversation.

Q. What did you tell him?

A. I told him the conclusions we had reached, and what I had written Mr. Love and that I had not heard from Mr. Love, and assumed that he was not interested in becoming a Conductor with no job.

Q. Did you have any subsequent contact with the EEOC?

Was there any further discussion by the way at this time?

A. Pertaining to Mr. Love, do you mean?

Q. Yes.

A. Nothing that I remember.

Q. Do you recall any subsequent contact subsequent to this discussion with this gentleman from the EEOC about Mr. Love?

A. I feel sure, and I felt sure, although I haven't found it, that he asked me for a letter stating that we did not intend to proceed further with Mr. Love's complaint. And I would have sworn that I wrote such a letter, but I haven't [23] found it.

Q. Did you have any subsequent contact from the time you wrote the letter——

A. No. I am sure—well, let me say this: That during or shortly after that period of time Mr. Roosevelt, of course, was yachting when the budget came up for the EEOC, and was sort of ousted, and there were some changes being made and when I say "we", our Commission got into the act of lobbying for a new chairman and a regional office somewhere in the west other than the Dallas office, and in the course of that, of course, I met Mr. Menies, and Mr. Robles, and finally an office was established in Albuquerque, and an outlying office here in Denver, and a man from our staff, Jim Warren became an EEOC representative in Denver for a year, or a year and a half.

So, that we—you asked me if I had any more contact with the EEOC. Yes. A lot of it, but none that I remember concerning Mr. Love.

Q. I don't have any further questions.

RECROSS-EXAMINATION

By MR. EPPICH:

Q. Correct me if I am in error here: The conversation that you had with the representative from the EEOC concerning Mr. Love was that in conjunction with over-all policies of the EEOC. Is that correct?

[24] A. Yes.

Q. The primary thing they were here for was setting up the EEOC?

A. I sort of got that impression that it was a familiarization of the region that was under the Dallas office.

Q. It is your recollection that this would have been in the late summer then of 1965?

A. To the best of my recollection it was.

Q. The conversation with Mr. Love came up as a shop-talk type thing, is that correct?

A. Sort of, yes.

Q. At that time they asked you to send a letter to them stating that you had not any intentions to take it further?

A. As I remember, yes.

Q. At that time you told them you didn't intend to take it any further?

A. That is correct.

Q. To date you have been unable to find any written complaint with the Colorado Civil Rights Commission pertaining to Mr. Love?

A. So far I have not.

Q. That is all I have.

FURTHER DEPONENT SAITH NOT

James F. Reynolds

[25] Subscribed and sworn to before me this —— day of ————, 196—.

My Commission expires April 3, 1972.

Notary Public
George H. Tencich

Cost to Defendants ——

DEPOSITIONS, INC.
CERTIFIED SHORTHAND REPORTERS
412 MAJESTIC BUILDING
DENVER, COLORADO
825-9109

December 9, 1968

James F. Reynolds
3333 South Wabash Court
Denver, Colorado

RE: Love vs. Pullman Company C-899

Dear Mr. Reynolds:

Your deposition taken in the above entitled case has now been transcribed and is ready for your signature.

It will be necessary for you to come to our offices, 412 Majestic Building, Denver, Colorado, within the next twenty days. For the purposes of reading and signing depositions, our offices are open Monday through Friday (holidays excluded) between the hours of 9:00 a.m. to 4:00 p.m.

The Court Rules require that we file your deposition "promptly." Therefore, if we have not heard from you within the next twenty days, we shall file your deposition with the Court without your signature.

Yours truly,

/s/ George H. Tencich
DEPOSITIONS, INC.

BY: _____

CC: Hugh J. McLearn, 1310 DC Bldg.
CC: Edward C. Eppich, 1908 Mile High Center
CC:
CC: Attached to original of
deposition for the Court

CERTIFICATE

STATE OF COLORADO
CITY & COUNTY OF DENVER } ss.

I, George H. Tencich, Certified Shorthand Reporter and Notary Public of the State of Colorado, duly appointed to take the deposition of the said JAMES F. REYNOLDS, do hereby certify that previous to the commencement of the examination of the said JAMES F. REYNOLDS, he was first by me duly sworn to testify the truth, the whole truth and nothing but the truth touching and concerning the matters in controversy between the parties hereto, so far as he should be interrogated concerning the same;

That said deposition was stenographically reported by me at the time and place heretofore set forth, and was reduced to typewritten form under my supervision, as per the foregoing;

That the foregoing is a true and correct transcript of my shorthand notes then and there taken;

That after the deposition was transcribed, the same was submitted by letter to the deponent for reading and signing, a copy of which is attached to the deposition of James F. Reynolds; (That to date of filing there has been no response by the deponent, and said deposition remains unsigned, and the same is filed herewith pursuant to the provisions of Rule 30-e);

That I am not of kin or in anywise associated with any of the parties to said cause of action, or their counsel, and that I am not interested in the event thereof;

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 9th day of December, 1968. My Commission expires April 3, 1972.

/s/ George H. Tencich
Notary Public
George H. Tencich

Cost to Defendants $67.75.

State of Colorado
Civil Rights Commission

July 30, 1965

Mr. Earl A. Love
Porter-in-Charge
Pullman Company
1511 East 29th Avenue
Denver, Colorado

Dear Mr. Love:

The discussion we held with the Pullman officials led to the following: seniority is lost if a person changes categories. If an "In-charge" Porter became a Pullman Conductor, he would become the lowest ranked conductor and would be subjected to lay off immediately, based on his new status.

It was my understanding that none of your people would be interested in a pay cut. If there are those who would not object, I will be happy to pursue the case to an end.
Sincerely,

/s/ James F. Reynolds
James F. Reynolds
Director

JFR:blg

Defendants Deposition Exhibit One (1) 12-8-68

8 pages

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20506

EARL A. LOVE
Charging Party

vs.

THE PULLMAN COMPANY
Denver, Colorado
Respondent

Case No. 6-5-5042

Date of alleged violation: Continuing
Date of filing: May 23, 1966
Date of service of charge: September 23, 1966

DECISION

Summary of Charge

Charging Party alleges discrimination based upon his race (Negro) as follows: He performs the same duties as "porter-in-charge" as are performed by conductors who are white. He does not receive the same rate of pay as conductors.

Summary of Investigation

The Respondent is a division of The Pullman Company, Chicago, Illinois. It is engaged in the maintenance and servicing of railroad sleeping cars. It has more than 100 employees and is engaged in interstate commerce. In its Denver office, it employs 48 persons, 23 of whom are Negro. All Negroes are employed as porters and all porters are Negro.

The Charging Party has been employed by the Respondent for more than 40 years, the last 20 of which he has been employed as a porter-in-charge. The Charging Party complains of the classification and wage schedule of Respondent that pays him less money for doing essentially the same work as conductors.

Porters are an all-Negro classification, and conductors are all white. Promotions for Negroes are limited to the

position of porter-in-charge, also an all-Negro classification. White persons are traditionally hired as conductors. Porters are represented by the Brotherhood of Sleeping Car Porters and have a labor management agreement with Respondent. The conductors are represented by the Brotherhood of Railroad Trainmen. Neither union is a named party to this proceeding.

The investigation established that the duties of the porter-in-charge and the conductor are essentially the same. According to the Respondent, both do the following acts:

1. collects tickets
2. collects cash
3. diagram work
4. equipment inspections
5. passenger contact

In addition to the above duties, as one might expect, the white conductor supervises the porters and attendants (Negro), prepares a ticket report, and supervises three or more cars. Porters-in-charge supervise one or two cars.

Thus, Respondent urges that it is complying with the collective bargaining agreement in classifying the jobs separately and in determining the rate of pay. Respondent acknowledges that the classifications are racial and knows that it has continued to maintain the racial classifications subsequent to the effective date of Title VII of the Civil Rights Act of 1964, to wit, July 2, 1965. Although the maintenance of discriminatory job classifications, and pay scales based thereon, were permissible prior to the effective date of Title VII, Respondent furnishes no basis, nor are we aware of any, that would condone such practices now. The Commission previously held that job classifications in the railroad industry whether segregated on the basis of race or sex are in violation of Section 703 (a) (1) and (2) of Title VII. And in cases such as this where a different rate of pay for doing essentially the same work exists with the only additional duties being those denied to Negroes to disqualify them from the higher classification, it is a discriminatory device prohibited by Title VII.[1]

The dilemma facing Charging Party is clear from the

[1] Case Nos. 5-10-1521 and 5-10-1778 thru 5-10-1781. I certify that this is a true copy of the Decision in Case No. 6-5-5042.

investigation. He is a Negro. He is a porter-in-charge performing essentially the same duties as a conductor. He cannot be promoted to conductor, an all-white classification despite the job relatedness of the two positions. It becomes obvious that the real difference in the jobs and the rates of pay is race.

Decision

Reasonable cause exists to believe that the Charging Party was discriminated against by the Respondent in violation of Title VII of the Civil Rights Act of 1964, as alleged.

For the Commission:
/s/ Marie D. Wilson
MARIE D. WILSON
Secretary

Jan. 24, 1968
Date

TO: Director of Compliance

FROM: Joe L. Black, Austin

RE: Earl A. Love
1511 E. 29th Avenue
Denver, Colorado 80205

Case No. 6-5-5042

vs.

The Pullman Company
23rd & Fox Street
Denver, Colorado 80216

FINAL INVESTIGATION REPORT

I. *The Charge*

Earl A. Love, Charging Party, alleges discrimination on the basis of Race (Negro) as follows: that he performs duties as a porter-in-charge which are duties and responsibilities of a pullman conductor, and yet, he receives lower wages than a pullman conductor.

II. *Chronology of Events*

Charging Party stated that 40 years ago he was employed by The Pullman Company as a sleeping-car porter, and that he has been porter-in-charge for the past 20 years. He claims that when he is on duty as a porter-in-charge, he has the duties and responsibilities of a pullman conductor, but he receives porter's pay. He stated that he was not interested in a conductor's position, but that if he performs the duties of a conductor, then he believes he should get paid for it. He said that he believes the union contract (TAB F) is discriminatory inasmuch as it limits his advancement and prohibits him from getting higher wages. Thus, he filed a complaint with the Equal Employment Opportunity Commission on May 23, 1966.

III. *Background*

The Pullman Company in Denver, Colorado, is a division of the Pullman Company, an Illinois Corporation with Headquarters in the Butler Building in Chicago, Illinois. It is not a Plans for Progress Firm. Jurisdiction of EEOC derives from employment of approximately 300 employees

in both Denver and Illinois. TAB I. This firm engages in interstate commerce.

The Pullman Company's main activity is servicing sleeping cars.

The city of Denver is a rapidly-growing center for business and commerce with widely diversified industry. The 1960 U. S. Census Report shows an estimated population of 493,887—30,251 are Negro and 41,590 are Mexican-American.

A tour of the facilities revealed no evidence of discrimination in the use of rest-rooms, water fountains, etc. An EEOC poster was in evidence in the personnel office.

Respondent's employees are affiliated with the Brotherhood of Sleeping Car Porters Union. TAB F.

IV. *The Facts*

Interview with Charging Party at 1511 E. 29th Avenue, Denver, Colorado, on July 23, 1966. Charging Party stated that he first went to see Mr. James Reynolds, Director of the Civil Rights Commission of Colorado, but believed that Mr. Reynolds was not much interested in his case. TAB G. He said that Mr. Reynolds thought that he (Charging Party) wanted a promotion to the position of conductor, however, this was not the case. He stated that his concern was getting conductor's pay since he had conductor's duties and responsibilities.

Mr. Reynolds told Investigator that he personally investigated Charging Party's charge and talked with Mr. Huffendick, Superintendent of The Pullman Company, concerning the disposition of charge. He said that from this investigation he noted that porters and conductors are in separate lines of progression—Negroes perform as porters and only Whites perform as conductors. Mr. Reynolds stated that Mr. Huffendick explained that this was due to the Union's Collective Bargaining Agreement. Mr. Reynolds stated that he wanted to pursue the investigation to an end but hadn't heard anything further from Charging Party. TAB G.

Charging Party stated that Whites are hired from the streets as conductors, yet, Negroes are never given the opportunity to progress or advance to this position. Investigator asked both Charging Party and Management to explain the duties of porter-in-charge and conductor. Es-

sentially, the answers were the same. It was explained that a conductor's duties consisted of:

a. supervising employees such as porters and attendants
b. collecting tickets
c. reporting tickets
d. cash and diagram work
e. duties relating to equipment inspections
f. passengers contact
f. handles three (3) or more cars

The porter-in-charge duties consist of:

a. prepares sleeping accommodations
b. sets up a car, generally for service
c. collects tickets
d. collects cash
e. diagram work
f. notes defects in equipment
g. passenger contact
h. handles only one (1) pullman car

Charging Party stated that since he performs the duties of a conductor too, he should be given conductor's pay; however, Charging Party is in charge of only one pullman car. The Union Agreement specifically provides that:

> "Rates of pay for 'in-charge' porter's service . . . an employee assigned to run 'in-charge' of two (2) or more cars shall be paid the conductor's minimum rate for time actually in such service."

Since Charging Party is in charge of only one pullman car, the agreement prohibits his receiving conductor's pay. This was corroborated by Respondent.

Interview with H. T. Huffendick, District Superintendent, on July 27, 1966. Mr. Huffendick received the charge. TAB B. He also received the Receipt for Service but refused to sign it. He refused to make records accessible to Investigator saying that he had to get clearance from the main office in Chicago. Investigator informed him that another contact would be made in the hope that he had obtained clearance. (Investigator was called back to the Regional Office and did not return to Denver until September 1966.) On September 23, 1966, Investigator contacted Mr. Huffendick who signed the Receipt for Service (TAB C) and the

EEOC-1 (TAB I). Mr. Huffendick orally denied the charge and prepared a written statement. TAB E. He essentially based his denial of the charge on the ground that the Union's Collective Bargaining Agreement was controlling insofar as Charging Party receiving conductor's wages since Charging Party is in charge of only one pullman car at a time, whereas, a conductor may supervise ten or more pullman cars. TAB E.

Investigator asked Mr. Huffendick whether Negroes were given the same opportunity to advance to the position of conductor as others. He stated that to his knowledge, no Negro had held this position.

V. *Investigative Conclusions—Alleged Violations*

Investigation disclosed that Respondent is not violating Section 703(a)1 of Title VII of the Civil Rights Act of 1964 as far as wage discrimination is concerned.

It is concluded by Investigator that porters-in-charge do not have the same responsibilities as pullman conductors.

Investigative Conclusions—Non-Alleged Violations

Investigation disclosed that the Sleeping Car Porters Union and Respondent are in violation of Title VII of the Civil Rights Act of 1964 by the following act:

> Respondent and Union have entered into a collective agreement which limits advancement of Negroes from a porter's position to a conductor's position and only whites are employed as conductors, while Negroes are employed as porters and as "in-charge" porters.

VI. *Recommendation to the Commission*

It is recommended that the Commission find no probable cause to believe that the charge is true.

It is further recommended that the Commission consider the issuance of a Commissioner's charge against the Pullman Company and the Brotherhood of Sleeping Car Porters Union.

I CONCUR WITH THE ABOVE RECOMMENDATIONS.

/s/ L. G. W.
LEE G. WILLIAMS,
Regional Director

United States Court of Appeals
Tenth Circuit

[Filed, Sep. 22, 1969, William L. Whittaker, Clerk]

EARL A. LOVE, *Plaintiff-Appellant,* v. THE PULLMAN COMPANY, an Illinois corporation, *Defendant-Appellee.*	No. 209-69.
THE PULLMAN COMPANY, an Illinois Corporation, *Defendant-Cross Appellant,* v. EARL A. LOVE, *Plaintiff-Cross Appellee.*	No. 226-69.

HUGH J. MCCLEARN, Denver, Colorado (Frederick Miles, and Van Cise, Freeman, Tooley & McClearn, Denver, Colorado, with him on the Briefs), for Appellant and Cross-Appellee.

EDWARD C. EPPICH, Denver, Colorado (Neef, Swanson, and Myer, Denver, Colorado, with him on the Brief), for Appellee and Cross-Appellant, The Pullman Company.

MARIAN HALLEY, Attorney, Washington, D. C. (Daniel Steiner, General Counsel, and Russell Specter, Assistant General Counsel, with her on the Brief), for United States Equal Employment Opportunity Commission, as Amicus Curiae.

Before FAHY, Senior Circuit Judge *, LEWIS and SETH, Circuit Judges.

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* Of the United States Court of Appeals for the District of Columbia Circuit, sitting by designation.

SETH, Circuit Judge.

Appellant brought suit pursuant to 42 U.S.C.A. § 2000e-5(f), a portion of Title VII of the Civil Rights Act of 1964, alleging that he was discriminated against in employment because he was a Negro. The appellee moved to dismiss the complaint on the ground that the charge was not timely filed with the Equal Employment Opportunity Commission and that appellant's cause of action was moot. The trial court treated appellee's motion as a motion for summary judgment, and granted it. This appeal was then taken. The Equal Employment Opportunity Commission has filed a brief as amicus curiae.

Appellant was employed by the appellee for more than forty years as a Pullman porter. He resigned from this position in November 1968. In 1951 the appellant was classified and began to perform the duties of a "porter in charge." Appellant states that the duties of a porter in charge are for all purposes identical to those of a Pullman conductor, and that porters in charge must at all times be available to work as such a conductor. Porters in charge however receive substantially lower wages than do conductors.

In his suit, appellant asserts that he has been restricted to the classification of porter in charge because of his race and that the classification of conductor is primarily an all white classification from which Negroes were excluded.

The trial court found that in 1963 the appellant filed a written charge of discrimination with the Colorado Civil Rights Commission and that in 1965 he orally restated his complaint to that same commission. The court found also that this oral statement did not literally comply with the Colorado statute governing the same, but it was substantial compliance. The court found that the appellant's case was thereby reopened in 1965, but the commission was unable to reach an arrangement with The Pullman Company that was satisfactory to the appellant. The company advised the commission they would promote the appellant to conductor, but by reason of the union contracts he would be very low in seniority as a conductor and that he would probably be laid off. The commission so advised the appellant by letter. This was found by the trial court to have

terminated the proceedings on appellant's complaint in July 1965.

Thereafter, on May 23, 1966, appellant sent a letter complaint to the Equal Employment Opportunity Commission (EEOC) in Washington making the same complaint that he had to the Colorado commission. When the EEOC received appellant's letter it, in some way undisclosed in the record, informed the Colorado commission that it had received a charge of discrimination which appeared to be within the jurisdiction of the Colorado commission. By letter of June 1, 1966, the Colorado commission advised the EEOC that in light of its prior contacts with the appellant and his failure to return to file a complaint, the commission would not "accept" the sixty day deferment period, waived it, and asked the EEOC to proceed.

The EEOC then served a copy of the charge on the appellee and began an investigation. A charge on an EEOC form signed by appellant dated July 23, 1966, also appears in the record, and we assume this supplemented his original letter of May 23, 1966.

A "Final Investigative Report" by a Regional Director of the EEOC found no violation of Title VII. He instead found that the Sleeping Car Porters Union and The Pullman Company were in violation of the Act by reason of their union contract. He recommended that a commissioner's charge be brought on this basis. The commission thereafter found otherwise and issued its Decision that there was instead reasonable cause to believe that there was discrimination. On May 3, 1968, the EEOC notified the appellant that it had been unable to secure the appellee's voluntary compliance with Title VII and that the appellant had thirty days in which to bring suit.

The appellant then duly filed a complaint and later an amended complaint on behalf of himself and of all persons similarly situated who had suffered from the appellee's alleged discriminatory employment practice. The appellant also prayed that appellee be enjoined from classifying its employees on the basis of race and sought back pay for himself and for the class of persons situated as himself in the amount of the difference between the wages they had earned and what they would have earned but for appellee's discrimination.

The trial court in granting summary judgment in favor of the appellee ruled that since the Colorado Civil Rights Commission had terminated its proceedings on appellant's complaint on July 30, 1965, and inasmuch as appellant did not file his charge with the EEOC until May 23, 1966, or more than thirty days after termination, appellant had failed to comply with section 706(d) [42 U.S.C.A. § 2000e-5 (d)].

The trial court also ruled that since the appellant had resigned from employment with the appellee in November 1968, his request for injunctive relief was moot.

We must affirm the trial court on the timeliness of filing issue, and to thereby give effect to the time limits expressed in the statute.

It is clear that the Colorado Civil Rights Commission acts under a Colorado statute prohibiting the employment practice alleged and establishing state authority to grant or seek relief all as contemplated in section 706(d) of the 1964 Civil Rights Act [42 U.S.C.A. § 2000e-5]: Since the Colorado statute and the State commission so come within the terms of section 706(b) of the Act, no charge can be filed with the EEOC under section 706(a) until after the expiration of sixty days after proceedings are commenced in the State, unless the State proceedings terminate within such time. Further the Act in section 706(d) [42 U.S.C.A. § 2000e-5(d)] provides that filing with the EEOC must be made under these circumstances within two hundred ten days after the alleged unlawful employment practice occurred, "or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, ..."

The trial court found, and the record shows, that the Colorado commission terminated its proceedings on plaintiff's complaint on July 30, 1965, and so notified him. We also agree that this second period of consideration was an effective reopening of prior proceedings on the same complaint. Thus if appellant had filed his complaint with the EEOC within thirty days thereafter there would be no question as to its authority to act on such a complaint. Appellant did not do so but waited until some time later and mailed a letter of complaint to the EEOC.

The appellant, and the EEOC as amicus curiae, argue

here that this letter to the EEOC started a new chain of events, and they ignore the prior failure by appellant to comply with the time requirements. The EEOC, to sustain this position, urges that upon receipt of a complaint letter directly from an individual as the appellant here, it may hold it in some sort of suspense and "advise" the State commission concerned. Then at the end of the period the State has to consider complaints (sixty days) the commission can then automatically "assume jurisdiction," as if the complaint had been made directly to the State agency and, thereafter within the time limit, filed with the commission.

As indicated above, we must affirm the trial court in its holding that the time limit was ignored as to the complaint appellant himself filed with the Colorado commission. We also hold that the device used by the EEOC to start a new time sequence was ineffective to do so. Under the Act, when the appellant's letter to the EEOC was received it was thereby filed as the filing date cannot be manipulated by the commission. Its own regulations state ". . . a charge is deemed filed when the Commission receives from the person aggrieved a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of." The charge was apparently definite enough for the EEOC to advise the Colorado commission although the record does not show how this was done. The EEOC in its brief also states: "It is established beyond question that a charge, originally in the form of a letter, may later be reduced to proper form, and that the later official charge will relate back to the date of the letter." Thus the charge here concerned was filed when received, and at that time the EEOC had no authority over the matter because it had then not yet been presented to the Colorado commission.

In International Bhd. of Elec. Workers v. United States Equal Employment Opportunity Comm'n, 398 F.2d 248, the Third Circuit held that a charge when filed with the EEOC before the expiration of the State's sixty day period was not then valid. The same situation here prevails because appellant's charge was filed with the EEOC before Colorado had a chance to act on it. The court in I.B.E.W. however found a subsequent charge filed within the statutory time

intervals and sequence was valid and within the two hundred ten day period.

The trial court in the case at bar also had no statutory power to hear the case because the EEOC also lacked such authority. The trial court so held. See Washington v. Aerojet-General Corp., 282 F.Supp. 517 (C.D.Calif.), where the date of receipt and the date of filing were also considered.

The Civil Rights Act of 1964 is precise in its requirements that the States with adequate statutes and machinery have the first opportunity to consider complaints. This first opportunity is a clear requirement in the sequences set out in the Act. This opportunity cannot come by an advice from the EEOC that a complaint has already been filed with it. This practice seeks to channel complaints first to the EEOC which then "advises" the State agency, gives it sixty days, and then the EEOC automatically proceeds. The statute does not contemplate this procedure.

In the case before us the record does not show what the EEOC advised the Colorado commission nor how it did so. We have only the Colorado commission's response. This response, as mentioned above, noted that appellant had requested nothing further of the State commission, indicated that appellant was perhaps disappointed in it, and asked the EEOC to proceed. This reference shows, of course, that the same complaint theretofore presented to the Colorado commission was recognized. Thus this is not an instance where the State agency was unfamiliar with the complaint. Its letter of June 1, 1966, indicates that appellant was expected to return. We don't of course know whether other action would have been taken had appellant returned to it and presented another complaint. The deposition of the State director only states that the policies were undergoing substantial changes at the time. After careful consideration we cannot on this record say that submission to the Colorado commission by appellant would have been wholly futile.

We must thus apply the procedure and the time limits set by Congress which are explicit in the statute. The language is clear and needs no interpretation. However, there were important reasons set out in the legislative history as to why the complaints must first be filed with

the State agency when the State statute contains the required provisions. 110 Cong.Rec., part 10, 13008 and 12721 (1964), 88th Cong.2d Sess. The debates in Congress include a variety of views as to several sections of the Act, especially the provisions relating to conciliation; however, the sequence of State and federal action was debated with little or no evidence of a difference of opinion as to the meaning of the provisions proposed. It became a fundamental issue, and the subject of a significant compromise; thus the legislative history is also clear if it need be considered.

The court in Equal Employment Opportunity Comm'n v. Union Bank, 408 F.2d 867 (9th Cir.), held that the mandate is evident that the claimant must first proceed "under available state law before filing a charge with the EEOC." The time limitation for filing with the EEOC follows to permit the federal agency thereafter to consider the matter. For reasons Congress fully considered, the reference of complaints to the federal agency comes after their consideration by the States. See also Edwards v. North American Rockwell Corp., 291 F.Supp. 199 (C.D.Calif.).

In order to preserve this stated sequence and the statutory thirty day period in which to invoke federal agency authority, the holding must be that the appellant waited too long after final State action to take the matter to the EEOC, and thus the federal agency did not have authority to act, nor did the trial court.

The sequence and the time period is applicable under the statute to all types of allegedly unlawful discrimination. *It does not differentiate between continuing discrimination and isolated incidents.* The familiar "continuing violation" argument advanced by appellant and the EEOC would permit a complaint to be initially filed with it at any time whatever as to a continuing offense, and the elements of the Act considered above would thereby be destroyed.

AFFIRMED.

Nos. 209-69 Earl A. Love v. The Pullman Co.
Nos. 226-69 The Pullman Co. v. Earl A. Love

FAHY, Senior Circuit Judge, dissenting.

As the court points out, the trial court found the reopened 1965 case was terminated by the State Commission in July

of that year. No complaint was filed with the Equal Employment Opportunity Commission within thirty days thereafter. It follows, I agree, that § 706(d) (42 USCA § 2000e-5(d)) was not complied with, insofar as the reopened 1965 case is concerned. However, on May 23, 1966, as the court also points out, appellant sent a letter complaint to EEOC. Since the discrimination of which he had complained to the State Commission, and now complained to EEOC, was of a character which continued to the time of the filing, this complaint, if it were handled so as to meet the procedural requirements of the Act, initiated a new case.

To recognize that some discrimination is of a continuing character is not to say that repetitious complaints or reopenings may be unlimited. An administrative agency, as well as a court, has the power to prevent abuse of its process. But I find no such abuse here, just as this court found none when it accepted as valid an oral renewal in 1965 of Love's formal complaint made before the State Commission in 1963. In fact, our court now comments that had appellant filed his present complaint with EEOC within thirty days after he was notified that his 1965 complaint to the State Commission was terminated "there would be no question as to the (EEOC's) authority to act on such a complaint." The court makes no mention, however, of the requirement in § 706(d) (42 USCA § 2000e-5(d)) that a valid complaint to EEOC, if a state commission has taken jurisdiction, must be made within 210 days after the alleged employment practice occurred or within 30 days after receiving notice of the termination of state proceedings, whichever is earlier. If Love's renewed complaint before the state commission in 1965 was not justified by a continuing discrimination, any complaint to EEOC at this later time would clearly have been filed more than 210 days after the alleged unlawful employment practice which led to the 1963 complaint.

The absence of abuse is further evidenced by the acquiescence of all the parties in the propriety of the present proceedings as they went forward before EEOC. That agency treated the complaint of May 23, 1966 as a new complaint or renewal of an earlier one, not as an untimely effort to confer jurisdiction upon EEOC after the termina-

tion of earlier proceedings. Perhaps even more significantly, it was so treated by the State Commission itself. Furthermore, in the ensuing proceedings before EEOC, the Pullman Company also so treated it. It was only after EEOC had itself terminated the case initiated by the May 23, 1966 complaint and Love timely went to the District Court that the Pullman Company raised there the objection now accepted by our court.

It is apparent that the complaint of May 23, 1966 cannot be considered an abuse of the statutory scheme. This court nevertheless holds that EEOC's referral of this complaint to the State Commission was not compliance with § 706(b) (42 USCA § 2000e-5(b)). The court correctly observes that § 706(b) requires a complaint of employment discrimination to be filed before a state commission, if one exists, before it is to be considered by EEOC. To meet this requirement of the Act, EEOC adopted the practice of referring a charge, mistakenly filed initially with it, to the appropriate state agency, EEOC subsequently assuming jurisdiction.[1] The authority of EEOC to make such referrals has been embodied in an amendment of Regulation § 1601.12 (F.R. Doc. 68-13553, eff. Nov. 7, 1968):

> The aggrieved party shall be notified, in writing, that the document which he sent to the Commission has been forwarded to the state or local agency pursuant to the provisions of § 706(b), and that unless the Commission is notified to the contrary, on the termination of state or local proceedings, or after 60 days have passed, whichever comes first, the Commission will consider the charge to be filed with the Commission and commence processing the case.

This regulation was not in effect when EEOC referred Love's complaint to the State Commission, but, as indicated above, it merely formalized the earlier Commission procedure. That procedure, conforming to the statutory scheme, has been accepted, without being questioned, by the Third Circuit in *International Bhd. of Elec. Workers* v. *EEOC*, 398 F.2d 248 (3rd Cir. 1968). In that case, as in ours, a charge of discrimination was originally filed with EEOC, which referred the complaint to the state agency. The

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[1] G.C. Opin. 11/18/65 & 12/2/65; Comm. Dec. 12/30/65.

charging party never made a formal complaint directly to the state agency. The court nevertheless tacitly found compliance with § 706(b). EEOC had proceeded upon the original complaint after a subsequent request by the complaining party that it assume jurisdiction.

EEOC's past procedure and present regulations do not run counter to the policy of the Act. On the contrary, as the regulations state, "it is the intent of the Commission to thereby encourage the maximum degree of effectiveness in the state and local agencies." [2] Yet, with no mention of the current regulations, the court rules inconsistently with them, and in my view thus unduly restricts the right of EEOC to entertain and expedite claims for which it has responsibility under the Act to seek a solution. I think we should keep in mind that,

> we are not dealing with businessmen-plaintiffs or plaintiffs accustomed to consulting lawyers about their rights. This law is a remedial one, and the Congressional purpose would not be furthered by making plaintiffs of the kind with which we are concerned, members of the working class who are generally without substantial higher education, dot every "i" and cross every "t" on the way to the courthouse.[3]

The consistency of the EEOC procedure with the policy of the Act is emphasized by the facts of this case. The Colorado Commission, as a result of the 1963 and 1965 complaints, fully considered Love's complaint before EEOC was even aware of its existence. The State Commission had been unable to obtain an arrangement satisfactory to the parties, and, accordingly, terminated its proceedings. These unsuccessful efforts of the State Commission led Love to go to EEOC for relief: EEOC, in order to bring the matter within the statutory plan, that is, to enable the Colorado Commission to have the fullest opportunity to consider the complaint initially, referred it to that Commission. Because of the Colorado Commission's acquaintance with the Love grievance and with his dissatisfaction with the result of its efforts, it informed EEOC that it would waive jurisdiction over the matter. Only at this

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[2] Reg. § 1601.12, *supra.*

[3] *Antonopulos* v. *Aerojet-General Corp.*, 295 F. Supp. 1390, 5 (E.D.Cal. 1968).

point did EEOC assume jurisdiction. I think it was entitled to do so, and that after the termination of its proceedings the District Court obtained jurisdiction by the timely filing of suit by Love—that Love then came to the door of the court with quite valid credentials.[4] Accordingly, I respectfully dissent in appeal No. 209-69 from the court's affirmance of the District Court's order dismissing Love's complaint.[5]

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[4] I do not read *International Bhd. of Elec. Workers* v. *EEOC, supra,* as does the court. Moreover, it should be noted that *Washington* v. *Aerojet-General Corp.*, 282 F. Supp. 517 (C.D.Cal. 1968), also cited by the court, relied upon the case in the District Court which was reversed by the Third Circuit in the *IBEW* case, *supra.* See footnote 9, 282 F. Supp. at 522. And *EEOC* v. *Union Bank,* 408 F.2d 867 (9th Cir. 1969), also cited, does not oppose the position I take; for there the matter seems never to have been before the State agency at all.

[5] The cross-appeal of the Pullman Company, before us in appeal No. 226-69, takes issue with the District Court's ruling that the proceedings before the Colorado Commission were validly reopened in 1965, a ruling with which this court agrees. It is unnecessary for me to take a position on this matter since in any event I conclude that the complaint of May 23, 1966, validly set in motion proceedings which led to the timely filing by Love of his complaint in the District Court which in my opinion gave that court jurisdiction.

United States Court of Appeals
Tenth Circuit

[Filed Jul. 30, 1970, William L. Whittaker, Clerk]

EARL A. LOVE, *Plaintiff-Appellant,* v. THE PULLMAN COMPANY, an Illinois Corporation, *Defendant-Appellee,* and UNITED STATES OF AMERICA, and EQUAL EMPLOYMEN OPPORTUNITY COMMISSION, *Intervenors.*	No. 209-69.

United States Court of Appeals
Tenth Circuit

No. 209-69—July 1970 Term

Earl A. Love, *Plaintiff-Appellant,* v. The Pullman Company, an Illinois Corporation, *Defendant-Appellee,* and United States of America, and Equal Employment Opportunity Commission, *Intervenors.*	Appeal From The United States District Court For The District of Colorado (District Court No. C-899) *Opinion on Rehearing*

Hugh J. McClearn, Denver, Colorado (Van Cise, Freeman, Tooley & McClearn, Denver, Colorado, with him on the Brief), for Appellant, Earl A. Love.

Edward C. Eppich, Denver, Colorado (Neef, Swanson and Myer, Denver, Colorado, with him on the Brief), for Appellee, The Pullman Company.

Benjamin W. Mintz, Attorney, Department of Justice, Washington, D. C. (Stephen P. Passek, Attorney, Department of Justice, Washington, D. C., and James L. Treece, United States Attorney, with him on the Brief), for Intervenor, United States of America.

Russell Specter, Acting General Counsel, Washington, D. C. (Marian Halley, Attorney, with him on the Brief), for Intervenor, Equal Employment Opportunity Commission.

Before LEWIS, Chief Judge, FAHY, Senior Circuit Judge *, and SETH, Circuit Judge.

SETH, Circuit Judge.

Opinion on Rehearing

The Equal Employment Opportunity Commission argues for the first time on this rehearing the relationship of the effective date of Title VII of the Civil Rights Act of 1964 to the procedural and jurisdictional events. Title VII became effective on July 2, 1965, which was a date during which the Colorado Civil Rights Commission was attempting to provide some relief or remedy for the appellant. The record shows that the Commission discussed the complaint with The Pullman Company and advised Love that he could be promoted to the position of conductor, but under the existing Union contracts, his seniority as a conductor would be so low that he probably would be laid off. This was not a satisfactory prospect for appellant. This date, July 30, 1965, was determined by the trial court to be the termination date by the State authorities, and thus appellant's time for application for relief to the EEOC then began to run.

The EEOC on this rehearing now urges that the pre-July 2, 1965, event be disregarded as being ineffective as antedating Title VII. We agree with this position, but it does not materially alter the consideration of the events.

The termination by the Colorado Commission on July 30, 1965, could only have been of proceedings which related to events conditions, or acts which took place before the effective date of the Act, and insofar as these asserted acts of discrimination they could not have been within the jurisdiction of the EEOC. Crosslin v. Mountain States Telephone & Telegraph Co., 38 U.S.L.Week 2514, — F.2d — (9th Cir.); Nishiyama v. North American Rockwell Corp., U.S. D.C., Cent.Dis.Calif., #68-1423-AAH; Griggs v. Duke Power Co., 292 F.Supp. 243 (M.D.N.C.); Dobbins v. Local 212, Int'l Bhd. of Elec. Workers, 292 F.Supp. 413 (S.D. Ohio); Banks v. Local Union 136, Int'l Bhd. of Elec. Workers, 296 F.Supp. 1188.(N.D.Ala.).

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* Of the United States Court of Appeals for the District of Columbia Circuit, sitting by designation.

Thus the first post effective date that events could have been considered under the record before us were those referred to in the letter of complaint of May 23, 1966, sent by appellant directly to the EEOC. This was the letter the Commission did not file but suspended until the Colorado Commission was advised and a reply received on June 1, 1966. Then according to the arguments and briefs of the EEOC it "... automatically accepted the charge for filing." This determination of the time for filing was made by the Commission without further correspondence from the appellant as apparently later became the procedure, as described in the prior opinion of this court. International Bhd. of Elec. Workers v. United States Equal Employment Opportunity Comm'n, 398 F.2d 248 (3d Cir.).

The regulations of the Commission did not contemplate or permit such a manipulation of the filing date, and it is contrary to uniform practice before Governmental agencies. We are strongly urged to consider regulations adopted at a later date, but this cannot be done, even if the method could be regularized by the adoption of regulations.

It must be pointed out that if complaints of this nature are so received by the EEOC but not "filed" until a reply is received from a State agency or until sixty days have elapsed, it is entirely possible and even likely that the time for appeal of the person complaining may have elapsed by reason of prior termination by State authorities. Under these circumstances, the EEOC to save the appeal would have to "file" the complaint at a date much earlier than the day on which the situation became known to it. The post-date filings made "automatically" by the EEOC as described on this appeal have little to recommend them over pre-dating the "filings" to a date before the day such act was accomplished.

The EEOC here argues that it need only advise the State agency of the complaint. In its brief it states that section 706(b) ". . . requires only that a state agency be given notice of the claim and 60 days in which to deal with it before the EEOC may assume jurisdiction over the case . . .," and elsewhere that the requirements are met if it ". . . informs the state agency of the pendency of a charge. . . ." This without further word or act by the complainant to permit the EEOC to then "automatically"

assert jurisdiction after sixty days does not comply with the Act as described in the prior opinion.

The action of the trial court in treating appellee's motion as one for summary judgment and the granting of the motion is affirmed for the reasons stated in this opinion on rehearing and as set forth in the prior opinion.

AFFIRMED.

LEWIS, Chief Judge, concurring.

I concur in the affirmance of this judgment on its record facts for to do otherwise would give judicial approval to administrative "flexible" filing to obtain, postpone, or reject jurisdiction. Admittedly those persons seeking relief under the Act are usually uninformed as to procedural necessities, often present their problem in letter form and directly to the Commission, and so need regulatory or legislative protection to preserve their basic rights against unnecessary procedural bars. But this problem is not unique with this Commission and its solution certainly does not lie in the approval of the manipulated procedures reflected in this record. To do so, might well, under different facts, penalize compliance as well as reward noncompliance with the requirements of the Act.

No. 209-69—EARL A. LOVE v. THE PULLMAN COMPANY

On Rehearing

FAHY, *Senior Circuit Judge, Dissenting:* With a modification to be mentioned I adhere to the views expressed in my dissenting opinion filed September 22, 1969. In light of the fact that Title VII of the Civil Rights Act of 1964 did not become effective until July 2, 1965, I agree with the opinion of the court on rehearing that the correct basis for deciding that the Equal Employment Opportunity Commission did not have jurisdiction of the reopened 1965 case is that the conduct complained of occurred prior to July 2, 1965, rather than as stated in my dissent of September 22, 1969.

United States Court of Appeals
Tenth Circuit

SEPTEMBER TERM, SEPTEMBER 22, 1969

No. 209-69

EARL A. LOVE, PLAINTIFF-APPELLANT

v.

THE PULLMAN COMPANY, AN ILLINOIS CORPORATION,
DEFENDANT-APPELLEE

Before Honorable David T. Lewis, Honorable Charles Fahy and Honorable Oliver Seth.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado and was argued by counsel. On consideration whereof, it is ordered that the judgment of said court is affirmed. Honorable Charles Fahy dissents.

WILLIAM L. WHITTAKER,
Clerk,

By RUTH H. JACOBSON,
Deputy Clerk.

United States Court of Appeals
Tenth Circuit

JULY TERM—JULY 30, 1970

No. 209–69

EARL A. LOVE, PLAINTIFF-APPELLANT

v.

THE PULLMAN COMPANY, AN ILLINOIS CORPORATION, DEFENDANT-APPELLEE

and

UNITED STATES OF AMERICA, AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, INTERVENORS

Before Honorable David T. Lewis, Chief Judge; and Honorable Charles Fahy, Senior Circuit Judge; and Honorable Oliver Seth, Circuit Judge

This cause came on to be heard on rehearing, and was argued by counsel. Upon consideration whereof, it is ordered that the judgment of the United States District Court for the District of Colorado is affirmed. Lewis, Chief Judge, specially concurring; Fahy, Senior Circuit Judge, dissenting.

WILLIAM L. WHITTAKER, *Clerk,*
HELEN R. BARTHA, *Deputy Clerk.*

Supreme Court of the United States

No. 957– , October Term, 1970

United States, et al.,
Petitioners,

v.

The Pullman Company

Order Allowing Certiorari. Filed February 22, 1971.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. The case is consolidated with No. 6018 and a total of one hour is allotted for oral argument.

Supreme Court of the United States

No. 6018– . , October Term, 1970

Earl A. Love, et al.,

Petitioners,

v.

The Pullman Company

On petition for writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is consolidated with No. 957 and a total of one hour is allotted for oral argument.

February 22, 1971

☆ U.S. Government Printing Office: 1971—421-656/569